Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

CITY OF TACOMA, WASHINGTON; CITY OF AUBURN, WASHINGTON; AND CITY OF DES MOINES, WASHINGTON,
PETITIONERS,

v.

QWEST CORPORATION,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Added to the Communications Act by the Telecommunications Act of 1996, 47 U.S.C. §253 preempts state and local laws and requirements that "prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications service (§253(a)), but preserves the authority of state and local governments to "manage the public rights-of-way" or to require "fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way" (§253(c)). The questions presented are:

1. Whether the court of appeals was correct in holding that whether or not a municipal ordinance "ha[s] the effect of prohibiting the ability of" a complaining carrier to provide telecommunications service within the meaning of 47 U.S.C. §253(a) must be decided purely as a question of law, without considering whether, as a factual matter, the municipal ordinance it challenges actually has the effect of prohibiting it from providing service.

2. Whether the court of appeals, which had reversed the district court's dismissal of a § 253 counterclaim on ripeness grounds, properly proceeded to resolve the merits of that counterclaim on the pleadings by drawing factual inferences against the non-moving party.

3. Whether the reservation of local authority to charge "fair and reasonable compensation" for public right-of-way use in 47 U.S.C. § 253(c) includes authority to charge rent-based municipal fees for use of public rights-of-way or is instead intended to restrict municipal fees to an amount that is based on a municipality's costs of maintaining its public rights-of-way.

PARTIES TO THE PROCEEDING

In addition to Petitioners, the City of Tacoma, the City of Auburn, and the City of Des Moines, Washington, and the Respondent, Qwest Corporation, the parties to the proceeding in the court of appeals were the City of Bremerton, the City of Federal Way, the City of Fife, the City of Lakewood, the City of Medina, the City of Olympia, the City of Puyallup, the City of Renton, the City of SeaTac, the City of Tukwila, the City of University Place, and the City of Vancouver. All of these cities, like Petitioners, are in the State of Washington.

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CITY OF TACOMA, WASHINGTON; CITY OF AUBURN, WASHINGTON; AND CITY OF DES MOINES, WASHINGTON,
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QWEST CORPORATION,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The cities of Tacoma, Auburn, and Des Moines, Washington, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, as amended by its order denying rehearing (App. 1a-36a), is reported at 260 F.3d 1160. (The court of appeals' opinion prior to that amendment is reported at 247 F.3d 966.) The opinion of the district court (App. 37a-46a) is reported at 79 F. Supp. 2d 1214.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2001. After the timely filing of a petition for rehearing, the court of appeals issued an order denying rehearing and amending its opinion on July 10, 2001. (App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND ORDINANCES INVOLVED

Section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253 (Supp. V 1999), provides in pertinent part:

> (a) IN GENERAL. - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) STATE REGULATORY AUTHORITY. - Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) STATE and LOCAL GOVERNMENT AUTHORITY. - Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory

basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION. - If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Fed. R. Civ. P. 12 (c) is set forth at App. 47a. The ordinance of the City of Tacoma at issue is set forth at App. 48a-156a. The ordinance of the City of Auburn at issue is set forth at App. 157a-247a. The ordinance of the City of Des Moines at issue is set forth at App. 248a-344a.

STATEMENT OF THE CASE

As the Court has observed, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), "fundamentally restructure[d] local telephone markets." *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999). A critical provision of the 1996 Act is 47 U.S.C. §253, which represents Congress' effort to balance the 1996 Act's general goal of promoting competition in telecommunications markets, *see* H.R. Confer. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996), with the longstanding principle that the federal government not unduly intrude upon the sphere of functions reserved to state and local governments in our system of federalism, *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Section 253 strikes this balance by preempting state and local regulations that "prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services, 47 U.S.C. §253(a), while, at the same time, carving out safe harbors

that are immune from attack under §253(a). One of those safe harbors is §253(c), which provides that "[n]othing in [Section 253] affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way. . . ." Although the Court has had occasion to address other provisions of the 1996 Act,[1] this case presents the Court with the first opportunity to address the vital balance struck by §253.

Factual Background. Respondent Qwest Corporation ("Qwest")[2] is both an "incumbent local exchange carrier," 47 U.S.C. §251(h)(1) ("ILEC"), and a "Bell Operating Company," 47 U.S.C. §153(4) ("BOC"), within the meaning of the 1996 Act. Qwest has provided local exchange telephone service in each of the Petitioner cities for decades, and continues to do so. Qwest, like many telecommunications service providers, other public utilities and cable television system operators, installs and maintains a substantial number of miles of wires, cables and other facilities on, above or below streets and public rights-of-way that are owned or controlled by the Petitioner cities.

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1 *See, e.g., AT&T v. Iowa Utilities Board*, 525 U.S. 366; *Verizon Communications, Inc. v. FCC*, No. 00-511, ___ U.S. ___, 121 S. Ct. 877 (cert. granted Jan. 22, 2001); *WorldCom, Inc. v. Verizon Communications, Inc.*, No. 00-555, ___U.S. ___, 121 S. Ct. 877 (cert. granted Jan. 22, 2001). *FCC v. Iowa Utilities Board*, No. 00-587, ___ U.S. ___, 121 S. Ct. 878 (cert. granted January 22, 2001).

2 US West Communications, Qwest's predecessor in interest, was the original defendant/counterclaim plaintiff in the case, but due to a subsequent corporate merger, Qwest was substituted for US West as a party in the court of appeals. For convenience, we will refer to Qwest throughout the description of proceedings below.

Mindful of the 1996 Act's expressed preference in §253(c) for competitively neutral treatment of all telecommunications service providers, each Petitioner city adopted an ordinance intended to create a uniform method of treating the multiple new telecommunications users of city rights of-way that the 1996 Act was likely to generate. Tacoma Municipal Code, §§16.01.1-16.01.2; Auburn Municipal Code, §20.02.010; Des Moines Municipal Code, Chapter 20.01 (App. 53a-56a, 157a-159a, 248a-253a). The terms and provisions of each of the ordinances vary considerably, but they share the basic purpose of establishing a generally-applicable process for franchising, licensing and supervising the use of city streets and rights-of-way by telecommunications service providers and other users of city streets and rights-of-way. *Id.* Among other things, each ordinance requires those wishing to install facilities on, above or below city streets or rights-of-way to apply for and obtain a franchise or license from the City, to satisfy insurance and bonding requirements, to follow certain procedures when performing work in the public right-of-way, and to compensate the City for use of the public right-of-way. Tacoma Municipal Code, Chapters 16.01-02; Auburn Municipal Code, Chapters 20.02, 20.04, & 20.10; Des Moines Municipal Code, Chapters 20.04, 20.06, 20.08 & 20.09. (App. 53a-107a, 157a-181a, 210a-247a, 274a-295a, 327a-337a).

The District Court Proceedings. This case originally arose out of a dispute between Petitioners (as well as fifteen other Washington cities) and Qwest concerning the cost of relocating Qwest's rights-of-way facilities to accommodate improvements in city streets and right-of-way. Historically, Qwest had borne the cost of relocating its facilities in such circumstances. In 1996, however, Qwest notified cities and counties in Washington that it would no longer bear those costs and that it would not relocate its facilities to accommodate street and right-of-way improvements until

the city or county making those improvements paid Qwest the cost of relocating its facilities.

Petitioners and fifteen other Washington cities filed a complaint against Qwest in Washington state court seeking a declaration that, under Washington state and federal law, Qwest was obligated to pay relocation costs. The case was removed to federal district court. Qwest thereafter filed a counterclaim against Petitioners (as well as two other Washington cities) seeking a declaration that the right-of-way ordinances adopted by each of those cities violated, *inter alia*, 47 U.S.C.§253(a) because, according to Qwest, they "prohibit[ed] or ha[d] the effect of prohibiting" Qwest's ability to provide telecommunications service. The district court's jurisdiction over Qwest's counterclaim was based on 28 U.S.C. §§1331, 1332(a), 1343 and 1367. Petitioners filed a responsive pleading denying the essential factual allegations in Qwest's counterclaim.

The parties filed cross motions for summary judgment on the state law relocation cost claim. Qwest also filed a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings with respect to its §253 counterclaim, and the cities whose ordinances were challenged filed motions for partial summary judgment with respect to Qwest's §253 counterclaim. In support of its Fed. R. Civ. P. 12(c) motion and in opposition to the cities' motion for partial summary judgment, Qwest presented no evidence suggesting that it was unable to comply with the ordinance provisions it challenged, or that if Qwest were to comply, any city would refuse to grant it a franchise or take any other action that would in any way prohibit Qwest's ability to provide service.

The district court granted the cities' motion for summary judgment with respect to the state law relocation cost claim. (App. 39a-44a.) With respect to the §253 claim, the district court denied Qwest's Fed. R. Civ. P. 12(c) motion, as well as the cities' motion for partial summary judgment, as unripe. (App. 44a-45a.) Concluding that

Qwest "ha[d] not demonstrated that any of the Counterclaim Cities have attempted to enforce their ordinances against it or that any city ha[d] instructed [Qwest] that it must remove its equipment [from city right-of-way] for failure to file a franchise application," the district court reasoned that determining "which particular provision of which ordinance offends the [1996 Act]," and "whether [an] entire ordinance needs to be invalidated despite the ordinances' severability clauses" would be better accomplished "following specific attempts by the Counterclaim Cities to enforce their telecommunications ordinances. " (App. 45a.) As a result, the district court never reached, much less resolved, the merits of Qwest's §253 counterclaim.

Court of Appeals Proceedings. Qwest appealed the district court's rulings on both the state law relocation cost claim and its §253 counterclaim, and Petitioners and one other city cross-appealed the district court's denial of their motion for partial summary judgment on Qwest's counterclaim. The court of appeals affirmed the district court's decision in the cities' favor on the state law relocation cost claim but reversed the district court's decision dismissing Qwest's §253 counterclaim as unripe and remanded that claim to the district court with instructions to grant judgment in Qwest's favor. 247 F. 3d 966. Petitioners timely sought rehearing, which the court of appeals denied on July 10, 2001. The court of appeals did, however, simultaneously issue an amended opinion. (App. 1a-36a.)

With respect to Qwest's §253 claim, the subject of this Petition, the court of appeals held that the district court erred in finding the claim not ripe. (App. 15a-20a.) Rather than remanding Qwest's §253 claim to the district court to allow it to address the merits of that claim in the first instance, however, the court of appeals proceeded to resolve the merits of that claim without benefit of any initial district court review or any facts or evidence at all.

Although the court of appeals recognized that it was ordinarily inappropriate for it to resolve an issue not passed upon below (App. 19a (quoting *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976)), it declined to follow that rule here because it felt Qwest's §253 claim presented "pure issues of law" for which "no further factual amplification [was] necessary." (App. 18a-19a (citations omitted).) Notwithstanding §253(a)'s plain language that only those state and local requirements that "prohibit or have the effect of prohibiting the ability" of Qwest to provide service may be preempted, the court of appeals apparently believed any facts about the actual effect of the ordinances on Qwest or its ability to comply with them were irrelevant; according to the court of appeals, the only relevant facts were "the activity conducted by Qwest" (apparently, its provision of telecommunications services over facilities in pubic rights-of-way) and the fact that the ordinances applied to that activity. (App. 19a.)

The court of appeals characterized the question on appeal as "whether, *on the facts alleged*, Qwest is entitled to judgment as a matter of law." (App. 23a (emphasis added.)) Apparently overlooking that Qwest was seeking judgment on the pleadings with respect to its own counterclaim, the court of appeals thus seems to have assumed the truth of the facts alleged in Qwest's §253 counterclaim in holding that Qwest was entitled to judgment on the pleadings under Fed. R. Civ. P. 12 (c).

Turning to §253(a), the court of appeals opined that, based on its reading of four district court decisions, a municipal "regulatory structure that allows a city to bar a telecommunications provider from operating in the city 'prohibit[s] or ha[s] the effect of prohibiting' the company's ability to provide telecommunications services under 47

U.S.C. §253(a)."[3] (App. 25a.) Elsewhere in its opinion, the court of appeals somewhat inconsistently recognized in a footnote (added in the amended opinion) that the Sixth Circuit had held that a municipal regulation that "allows denial of a franchise does not alone constitute a prohibition within the meaning of §253(a)." (App. 27a n. 11 (citing *TCG Detroit v. City of Dearborn*, 206 F. 3d 618, 624 (6th Cir. 2000)).

Ultimately, the court of appeals held that "several features" of the ordinances at issue, "taken together," had "the effect of prohibiting Qwest and other companies from providing telecommunications services" within the meaning of §253(a).[4] (App. 25a-26a) The ordinance requirements that the court of appeals found, "in combination," had this effect were (1) the "lengthy and detailed" nature of the application form that had to be completed to apply for a franchise; (2) that two of Petitioners' ordinances (but not the third) required a public

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[3] Three of the four district court decisions relied on by the court of appeals for this proposition had been vacated. *Bell Atlantic v. Prince George's County*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated and remanded*, 212 F. 3d 863 (4th Cir. 2000); *AT&T Communications v. City of Dallas*, 52 F. Supp. 2d 763 (N.D. Tex. 1999), *vacated as moot*, 243 F. 3d 928, *on rehearing*, 249 F. 3d 336 (5th Cir. 2001); *AT&T Communications v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997), *vacated as moot*, 235 F. 3d 241 (5th Cir. 2000). (Cited in App. 24a-25a.) In the fourth, *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 89 (S.D. N.Y. 2000) (cited in App. 25a), the district court's holding with respect to §253(a) was based on facts – specifically, that the city in *White Plains* had for years failed to act on the complaining telecommunications provider's request for a franchise – not even alleged, much less supported here.

[4] As support for this proposition, the court of appeals cited (App. 26a-27a) two of the vacated district court opinions on which it relied earlier in its opinion, *Bell Atlantic*, 49 F. Supp. 2d at 816, and *City of Dallas*, 52 F. Supp. 2d at 770 (*see* note 3 *supra*), as well as another district court decision whose resolution of the §253(a) issue had been reversed by the Eleventh Circuit, *BellSouth Telecommunications v. City of Coral Springs*, 42 F. Supp. 2d 1304 (S.D. Fla. 1999), *affirmed in part, reversed in part, and remanded sub nom. BellSouth Telecommunications v. Town of Palm Beach*, 252 F. 3d 1169, 1192 (11th Cir. 2001).

hearing before a franchise was granted; (3) that the ordinances authorized the city to exercise discretion in deciding whether to grant, deny or revoke a franchise; (4) that transfers of a franchise or of ownership of a franchisee required city approval; (5) that the ordinances allowed the cities to impose certain fees that were not based on the "costs of maintaining the right of way"; and (6) that the ordinances contemplated the imposition of penalties for their violation. (App. 26a.) While there was no evidence in the record remotely suggesting that a multi-billion dollar BOC like Qwest could not comply with each of these requirements, or that Qwest would exit the market rather than doing so, or that, if Qwest were to comply with these requirements, the cities would not grant it a franchise, in the court of appeals' view these requirements nevertheless collectively "creat[ed] a substantial and unlawful barrier to entry into and participation in [Petitioner cities'] telecommunications markets." (App. 26a.)

The court of appeals turned next to §253(c), a "safe harbor provision" that, as the court of appeals recognized, "permits local regulations that 'manage the public rights-of-way ' and 'require fair and reasonable compensation' for the 'use' thereof." (App. 27a.) Having noted that §253(c) protects these two separate and independent local governmental interests, the court of appeals nevertheless ceased further consideration of "fair and reasonable compensation" for right-of-way use and devoted its attention exclusively to "management of the public rights-of-way." (App. 27a-33a.) The court of appeals held that Petitioners' ordinances did not constitute permissible right-of-way management under §253(c) because they "establish franchise systems that regulate the telecommunications companies themselves, not merely the rights-of-way." (App. 29a.) The court of appeals identified "four significant features of the ordinances" that, in its view, were "not directly related to management of the public rights-of-way": (1) "the ordinances require Qwest to undergo an extensive

application process"; (2) "the ordinances impose reporting requirements or other controls," including requiring approval of a transfer ownership of the franchisee; (3) the ordinances require that "franchise agreements contain certain conditions" that the court of appeals found objectionable, including a "most-favored-community" provision and a requirement that franchisees "provide free or excess capacity" for the city's use; and (4) the ordinances gave the cities discretion to grant, deny, or revoke a franchise based on the public interest.[5] (App. 29a-32a)

The court of appeals dismissed Petitioners' argument that the ordinances "regulate aspects of telecommunications companies that are related to their fitness to. . . use the rights-of-way" as a "children's ditty," believing that Petitioners' argument "would have no limiting principle." (App. 33a.) The court of appeals appears to have overlooked that, due to the posture of the case and the court's insistence that the "facts alleged" by Qwest must be assumed true (App. 23a), Petitioners had no opportunity to introduce evidence explaining the justifications for the ordinance requirements at issue.

Although the court of appeals addressed only a few provisions of comprehensive ordinances dealing with many matters that the court of appeals appeared to concede were legitimate forms of right-of-way management,[6] it nevertheless declined to sever the ordinance provisions it

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[5] Although the court of appeals believed these four "aspects of the ordinances. . . most seriously violate §253(c)," it also went out of its way to list several other aspects of the ordinances that it felt were "objectionable." (App. 32a-33a & n. 19.)

[6] *Compare* App. 28a-29a (listing of subjects the court of appeals believed were legitimate forms of right-of-way management) *with, e.g.*, Tacoma Municipal Code, Chapter 16.01; Auburn Municipal Code, Chapters 20.04 & 20.10; Des Moines Municipal Code, Chapters 20.04, 20.06, 20.07 & 20.08 (App. 65a-98a, 170a-181a, 210a-247a, 274a-334a) (ordinance provisions addressing these issues).

found objectionable; instead it preempted the ordinances *in toto*. (App. 34a-25a.) Unlike the district court, which concluded that the validity of the ordinances' provisions under §253 could meaningfully be addressed only on a provision-by-provision basis (App. 45a), the court of appeals spurned any "line-by-line severability analysis" of each city's ordinance as "not practical." (App. 34a-35a.)

REASONS FOR GRANTING THE PETITION

In the more than five years since Congress enacted §253, this key provision of the 1996 Act has spawned widespread litigation and considerable disagreement among the courts about its meaning.[7] The Court should

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[7] *E.g., compare BellSouth Telecommunications v. Town of Palm Beach*, 252 F. 3d 1169, 1187-89 (11th Cir. 2001) (rejecting holdings of district courts in *Bell Atlantic* and *Dallas* district courts that §253(a) limits municipal authority to the areas of right-of-way management and compensation and instead placing on complaining carrier the burden of proving that a local requirement "prohibits or ha[s] the effect of prohibiting service"); *TCG Detroit v. City of Dearborn*, 206 F. 3d 618 (6th Cir. 2000), *affirming* 16 F. Supp. 2d-785 (E.D. Mich. 1998) (holding that a requirement that a carrier obtain a franchise does not constitute a "prohibition" within the meaning of §253(a) and that "fair and reasonable compensation" under §253(c) is not limited to cost recovery but allows cities to charge "rent"); *TCG New York v. City of White Plains*, 125 F. Supp. 2d at 88-89 & 96-97 (§253(a) does not preempt all local regulation not protected by §253(c), whether §253(a) has been violated depends on the facts, and "fair and reasonable compensation" under §253(c) can include rent); *BellSouth Telecommunications v. City of Orangeburg*, 337 S.C. 35, 522 S.E. 2d 804 (S.C. 1999) (franchise ordinance that, among other things, requires notice of mergers and corporate restructuring is consistent with §253(c), and "fair and reasonable compensation" is not limited to cost recovery); *U.S. West v. Arizona Corp. Commission*, 198 Ariz. 208, 217, 8 P. 3d 396, 405 (Ariz. Ct. App. 2000) mere fact that regulatory requirements may be burdensome does not mean that they have "the effect of prohibiting service" within meaning of §253(a)), *with Bell Atlantic*, 49 F. Supp. 2d at 814-16 (§253(a) preempts all burdensome local regulation and any regulation not related to right-of-way management or compensation, and §253(c) restricts *Continued on next page.*

grant review to resolve conflicts among the courts of appeals, as well as other courts, about the meaning of §253(a) and §253(c) and to provide much-needed guidance to the lower courts concerning the proper procedure and burden of proof in §253 claims. The Ninth Circuit's decision in this case represents a serious misinterpretation of federal statutory law and federal rules of procedure that, if allowed to stand, would seriously undermine the ability of thousands of local governments across the nation effectively to regulate the use of public rights-of-way by private for-profit businesses and to protect the taxpaying public's substantial investment in the vital public resource that those rights-of-way represent.

I. THE COURT OF APPEALS' INTERPRETATION OF WHETHER STATE OR LOCAL REQUIREMENTS "HAVE THE EFFECT OF PROHIBITING SERVICE" UNDER SECTION 253(a) IS AT ODDS WITH THIS COURT'S CONSTRUCTION OF LANGUAGE IN A DIRECTLY ANALOGOUS PROVISION OF THE 1996 ACT AND CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The linchpin of the court of appeals' decision was its holding that whether Petitioners' ordinances "have the effect of prohibiting [Qwest's] ability to provide telecommunications service" within the meaning of §253(a) and whether Petitioners' ordinances fell within the right-of-way management and compensation savings clause of §253(c) were "pure issues of law" for which "no further

Continued from previous page.

compensation to fees designed to recover costs); *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N. D. Tex. 1998), *vacated and remanded as moot*, 243 F. 3d 928, *on rehearing*, 249 F. 3d 336 (5th Cir. 2001) (§253(a) preempts all burdensome local regulation and any regulation not related to right-of-way management or compensation); *Austin*, 975 F. Supp. at 939-40 (same); *Qwest v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001) (adhering to court of appeals decision in this case).

factual amplification is necessary." (App. 18a-19a (citations omitted).) It was this holding that led the court of appeals to reach the merits of Qwest's §253 claim and rule in Qwest's favor, even though the district court had not addressed the merits of the §253 claim at all. (App. 19a.)

There can be no question that in §253(a), Congress has "define[d] explicitly" the extent to which it intended to preempt state and local law. *English v. General Electric Co.*, 496 U.S. 72, 78 (1990). The scope of that preemption, however, is not unlimited. It is instead defined, and limited, by the plain language of §253(a): only those state or local requirements that "prohibit or have the effect of prohibiting" a complaining telecommunications service provider's ability to provide service are preempted. *See English*, 496 U.S. at 78. Moreover, in construing this plain language, courts must use "a 'presumption against the preemption of police power regulations' to support a narrow interpretation of such an express command [of preemption]." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Cipollone v. Liggett Group*, 505 U.S. 504, 523 (1992)).

The court of appeals, however, departed from both this presumption and §253(a)'s plain language in ways that are at odds both with this Court's interpretation of very similar language in another provision of the 1996 Act and with how other courts have construed §253(a). According to the court of appeals, §253(a)'s preemption of state and local requirements "is virtually absolute" with no need for factual inquiry into the actual effect that a particular local requirement may have on the complaining telecommunications provider's ability to provide service. (App. 24a.)

A. The Ninth Circuit's holding in this regard appears inconsistent with this Court's construction of a neighboring provision of the 1996 Act with parallel language. In *Iowa Utilities Board*, 525 U.S. at 388, the Court was confronted with the meaning of another provision of

the 1996 Act that required the Federal Communications Commission ("FCC") to consider whether the failure of an ILEC to provide access elements "would impair the ability of [a competing carrier] seeking access to provide the services it seeks to offer," 47 U.S.C. §251(d)(2)(B) (Supp V 1999) (emphasis added). Section 251(d)(2)(B)'s phraseology, "*impair the ability* [of a provider] to provide service," is of course strikingly similar to §253(a)'s phraseology, "*prohibiting the ability* of [a provider] to provide . . . service." In construing §251(d)(2)(B), this Court rejected as "not in accord with the ordinary and fair meaning" of "impair" the "assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element. . . causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services" within the meaning of §251(d)(2)(B). *Iowa Utilities Board*, 525 U.S. at 389-90 (emphasis in original).

If, as this Court held in *Iowa Utilities Board*, an increase in a telecommunications provider's costs or burden does not, without more, necessarily "impair" that provider's ability to provide service, then it is equally true that the mere fact that the ordinance requirements at issue here may increase Qwest's costs or burden, without more, does not necessarily mean that those requirements have the far more draconian effect of "prohibiting" Qwest's ability to provide service within the meaning of §253(a). Yet, by construing §253(a)'s preemptive scope to be "virtually absolute" and disdaining any factual inquiry into Qwest's actual ability to comply with the ordinance requirements at issue or their actual effect on its ability to provide service (App. 24a), that is precisely what the Ninth Circuit held here.

The tortured nature of the court of appeals' reading of "effect of prohibiting" becomes even more glaring when one considers that Qwest is not a new telecommunications service provider whose entry into the market §253(a) was designed to promote, but an ILEC and a BOC, whose entrenched local service monopoly §253(a) was intended to

erode.[8] To assume without any evidence, as the court of appeals did, that an entrenched, multi-billion dollar BOC like Qwest would not or could not comply with the ordinance requirements at issue is not merely contrary to the plain wording and purpose of §253(a), but counterintuitive.

B. The court of appeals' conclusion that whether a local requirement "ha[s] the effect of prohibiting service" is purely an "issue[ ] of law" also conflicts with other courts' and the FCC's interpretation of §253. The FCC has recognized that §253 requires a fact-based inquiry: "Parties seeking preemption of a local legal requirement. . . must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c)." *In re TCI Cablevision*, 12 FCC Rcd 21396, 21440, ¶101 (1997). Similarly, unlike the court of appeals here, the court in *White Plains*, 125 F. Supp. 2d at 88, observed that:

> the parameters of what is considered prohibitory under §253(a) are not likely to be so broad as to preempt any and all local action [not saved by §253(b) or (c)]. Congress could have achieved that result by simply preempting all local actions in §253(a) rather than specifically dealing only with actions which 'prohibit or [have] the effect of prohibiting' telecommunications services.

And, echoing this Court's construction of the word "inhibit"

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[8] *See, e.g., Iowa Utilities Board*, 525 U.S. at 416 (Breyer, J., concurring in part and dissenting in part) (§253(a) intended to promote "new local entry by dismantling existing legal barriers that would otherwise inhibit it") & 405 (Thomas, J., concurring in part and dissenting in part) (§253(a) intended to "end[ ] States' longstanding practice of granting and maintaining local exchange monopolies" to ILECs and BOCs).

in *Iowa Utilities Board*, the Arizona Court of Appeals held that the mere fact that regulatory requirements may be burdensome does *not* mean that they have "the effect of prohibiting" service within the meaning of §253(a): "Prohibiting entry into a market is distinct from, and more severe than, merely making entry more burdensome." *U.S. West v. Arizona Corp. Commission*, 198 Ariz. at 217, 8 P. 3d at 405.

In essence, the court of appeals improperly rewrote §253(a) to preempt any state or local requirement that imposes some sort of cost or burden on the complaining telecommunications service provider (like filling out a form, providing information, or appearing at a public hearing), regardless whether there is any evidence about whether or not the provider could comply with the requirement or what effect compliance would have on the provider's ability to provide service. Under the court of appeals' "no facts needed" approach, §253(a) would become an open invitation to improper judicial legislation where courts, without benefit of any facts, subjectively assess whether they find the legislative acts of elected local governments unnecessary or unduly burdensome. Such an approach at odds not only with §253(a)'s plain language, but also with the proper role of the judiciary in reviewing legislative acts and with the respect owed the legislative decisions of state and local governments in our system of federalism.

C. The court of appeals' construction of §253(a) also conflicts with a decision of the Eleventh Circuit, *BellSouth Telecommunications v. Town of Palm Beach*, 252 F. 3d 1169 (11th Cir. 2001). The Ninth Circuit held here that the purpose of §253(a)'s "virtually absolute" preemption is to restrict the permissible subject matter of state and local regulation of telecommunications service providers to those matters listed in the safe harbors of §253(b) and (c): "certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has

narrowly circumscribed the role of state and local governments in this arena." (App. 24a.) Among the cases cited by the Ninth Circuit in support of this proposition were two vacated district court decisions, *Dallas*, 8 F. Supp. 2d at 591, and *Bell Atlantic*, 49 F. Supp. 2d at 814, each of which held that §253(a) preempts all state and local regulatory authority over telecommunications service providers other than that specifically preserved in §253(b) and (c).

In *Palm Beach*, the Eleventh Circuit explicitly disagreed with the very aspect of the *Dallas* and *Bell Atlantic* courts' reading of §253(a) on which the Ninth Circuit relied here. 252 F. 3d at 1187-1189. The Eleventh Circuit held:

> Latent in the opinions of the [*Dallas* and *Bell Atlantic* district] courts that have read subsections [253](b) and (c) as independent limitations on state and local authority is the maxim that . . . by expressly reserving certain powers to the state and local governments in (b) and (c), Congress must have intended that only those powers be reserved. While this argument may have some appeal at first blush, we note that if we were to read [§253] (b) and (c) as delineating the absolute boundaries of state and local authority in the field of telecommunications, the ['prohibitory effect'] limitation set forth in subsection [253](a) would be superfluous. Settled principles of statutory construction counsel against such a reading, . . . particularly when it would violate the plain meaning of the statute.

Id. at 1188 (citation omitted). The Eleventh Circuit went on to remand the case to the district court "for further proceedings to determine whether the sections of the [municipal telecommunications] ordinances [at issue]

violate subsection [253](a) because they may prohibit or have the effect of prohibiting the ability of any entity to provide. . . telecommunications service." *Id.* at 1191-92.

The Eleventh Circuit's decision in *Palm Beach* was rendered after the court of appeals' initial April 2001 decision here (247 F. 3d 966) but before its amended opinion of July 10, 2001. (App. 1a.) The *Palm Beach* decision was brought to the Ninth Circuit's attention in the course of Petitioners' Ninth Circuit petition for rehearing, but the court of appeals did not even mention that decision, much less attempt to distinguish it, in its amended opinion.

D. The court of appeals' interpretation of § 253(a) also appears to be at odds with that of the Sixth Circuit in *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000). The court of appeals here suggested that the mere fact that Petitioners' franchising processes contemplate the possibility that a franchise application might be denied "prohibit[s] or ha[s] the effect of prohibiting" a provider's ability to provide service with the meaning of 47 U.S.C. § 253(a). (App. 25a.) The court of appeals went on to state that the "ultimate cudgel" of Petitioners' ordinances is that "each city reserves discretion to grant, deny, or revoke franchises" (App. 26a).

The Sixth Circuit in *Dearborn*, in contrast, dismissed such reasoning as "sophistry." 206 F.3d at 624. In *Dearborn*, much as here, a telecommunications provider argued that the mere fact that it needed to apply for a franchise, which a city might or might not grant, constituted a "prohibition" under § 253(a). The Sixth Circuit had no difficulty rejecting the argument:

> [The complaining telecommunications service provider] attempts to characterize the City's ordinance as a prohibition, itself prohibited by 47 U.S.C. § 253(a). . . . [It] then describes the fee required to obtain the franchise as an afterthought, which conditionally lifts that prohibited

> prohibition. This is sophistry. The provider must apply for a franchise; the City assesses a franchise fee; no fee paid, no franchise given. That cannot 'be described as a prohibition [within the meaning of Section § 253(a)].' . . .The issue here is not . . . a municipality's withholding of consent to a franchise application, something the City never contemplated vis-à-vis [the complaining provider].

206 F.3d at 624 (citations omitted).

As in *Dearborn*, the issue in this case is *not* Petitioners' withholding of consent to Qwest's franchise application; to the contrary, Qwest never even applied for a franchise, and there is no evidence in the record remotely suggesting that, had Qwest applied for a franchise and fulfilled the ordinance requirements, Petitioners would not have granted it a franchise. Thus, the court of appeals' effort to distinguish the Sixth Circuit's *Dearborn* decision on this point is illusory. Absent some evidence that Qwest could not comply with the ordinance requirements at issue or that Petitioners would in fact deny Qwest a franchise, the supposed "variety of methods and bases on which a city may deny a franchise" (App. 27a n.11) is no different than the single potential basis for denial of a franchise upheld in *Dearborn*. The court of appeals' decision here therefore conflicts with *Dearborn*.

The conflict created by the Ninth Circuit's reading of §253(a) and that of the Sixth and Eleventh Circuits is of great moment, as it will result in varying degrees of federal intrusion into local municipal police powers depending on the geographic happenstance of where a particular municipality is located. Such inconsistency is inherently offensive to both of the values §253 seeks to balance: promoting competition in local telecommunications markets and, at the same time, preserving the dual

sovereignty inherent in our system of federalism. Only the Court can resolve this conflict, and it should do so.

II. THE COURT OF APPEALS' RESOLUTION OF THE MERITS OF A SECTION 253 CLAIM IN CLAIMANT'S FAVOR ON THE PLEADINGS IS CONTRARY TO THE DECISIONS OF THIS COURT CONCERNING APPROPRIATE STANDARDS FOR REVIEW.

A. Perhaps the most striking aspect of the court of appeals' decision to reach and resolve the merits of Qwest's §253 claim is the procedural posture in which it occurred. After Qwest filed its §253 counterclaim in the district court, Petitioners filed a responsive pleading denying the pertinent factual allegations in Qwest's counterclaim. Qwest then filed a motion pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings on its own counterclaim against Petitioners, which the district court dismissed as unripe. (App. 39a & 45a-46a.) The court of appeals subsequently reviewed Qwest's §253 counterclaim on what it believed was a Rule 12(c) standard of review: "[w]hether, on the facts alleged, Qwest is entitled to judgment as a matter of law." (App. 23a (citing Ninth Circuit Fed. R. Civ. P. 12(c) precedent).)

The problem is that the court of appeals got the Fed. R. Civ. P. 12(c) standard backwards. It is hornbook law that, in assessing a Rule 12(c) motion for judgment on the pleadings, a court "is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party," and "all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false." 5A C. Wright & A. Miller, Federal Practice and Procedure §1368, at pp. 519-20 (2d ed. 1990). The Court recognized this principle long ago, holding that where, as here, a plaintiff moves for judgment on the pleadings on its own

claim, all of the allegations in the defendant's responsive pleading must be treated as established. *National Metropolitan Bank v. U.S.*, 323 U.S. 454, 456-57 (1945).

The court of appeals decision directly conflicts with *National Metropolitan Bank*. Apparently confused by the fact that, unlike most Rule 12(c) motions, here the counterclaim plaintiff was moving for judgment on the pleadings with respect to its own claim, the court of appeals mistakenly assumed the truth of "the facts alleged" in Qwest's counterclaim (App. 23a), thereby viewing the facts and inferences in the light most favorable to the moving party, Qwest, and *against* the *non*-moving parties, the Petitioners.

This conclusion is confirmed by the balance of the court of appeals' opinion, where despite its suggestion that "[n]o further factual record would narrow or clarify [the §253] issue" (App. 19a), the court of appeals did in fact draw several factual inferences concerning the effect of Petitioners' ordinances on Qwest, uniformly drawing such inferences in Qwest's favor. Thus, for example, the court of appeals referred to the Petitioners' ordinance requirements as "costly and burdensome" (App. 19a), even though there was no evidence in the pleadings or the record concerning the costs or burdens of complying with those requirements, much less any evidence that any such costs or burdens would be prohibitive for a multi-billion dollar BOC like Qwest.

In fact, had the court of appeals drawn all factual inferences in favor of Petitioners, as Rule 12 and court precedent required it to do, the court of appeals could not have properly concluded on the pleadings that the ordinance requirements at issue necessarily had "the effect of prohibiting the ability" of Qwest to provide service. For aught that appears in the pleadings (and the record), the court would have been justified in inferring that (1) Qwest was able to comply with each of the ordinance requirements at issue; (2) Qwest would have complied with those requirements if it had been compelled to do so rather

than exiting the market; and (3) had Qwest complied with the ordinance requirements, Petitioners would have in fact granted it a franchise. Indeed, given Qwest's status as an entrenched BOC, these factual inferences would not only have been plausible, but perhaps the most logical ones to make. These obvious and permissible inferences in Petitioners' favor, standing alone, should have precluded any possible conclusion on the pleadings that the ordinance requirements at issue had "the effect of prohibiting" Qwest's ability to provide service.

The same error plagues the court of appeals' analysis of the §253(c) safe harbor for right-of-way management and compensation. With only the text of the ordinances before it and without any benefit of evidence and testimony explaining the background and purpose of each of the ordinance requirements at issue, the court of appeals proceeded to speculate that several of those requirements were unrelated to management of the right-of-way. (App. 29a-32a.) In so doing, the court of appeals substituted a "children's ditty" for the absent facts (App. 33a), as a result impermissibly drawing factual inferences against Petitioners, the non-moving parties.

Because the court of appeals departed from prior longstanding decisions of the Court and settled construction of an important rule of federal civil procedure, review is warranted.

B. By proceeding to the merits of the §253 claim on the pleadings when the district court had dismissed that claim on ripeness grounds, the court of appeals also appears to have departed from this Court's teaching in *Singleton v. Wulff*, 428 U.S. 106 (1976). In *Singleton*, much as here, a district court dismissed a plaintiff's claim on standing grounds without reaching the merits, and the court of appeals reversed the district court's decision on standing but then proceeded to the merits and ruled in plaintiff's favor. *Id.* at 110-112. This Court reversed, holding, *inter alia*, that the court of appeals resolution of the

merits was "an unacceptable exercise of its appellant jurisdiction." *Id.* at 119-20.

The Court began by noting the "general rule" that "a federal appellate court does not consider an issue not passed upon below." *Id.* at 120. This general rule is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have no opportunity to introduce evidence." *Id.* (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)).

To be sure, *Singleton* recognized that "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeal," and "announce[d] no general rule." 428 U.S. at 121. The Ninth Circuit here cited *Singleton* but nevertheless concluded that proceeding to the merits was appropriate because, in its view, Qwest's §253 claim presented only "pure issues of law that were briefed extensively before the district court and again before the court of appeals." (App. 19a.)

The court of appeals' analysis, however, is flawed in two fundamental respects. First, it overlooked that, while the parties did indeed touch on the merits of Qwest's §253 claim in their briefs, one of the arguments that Petitioners made in those briefs was that further discovery and factual development were required to resolve the §253 claim. Second, the premise of the court of appeals' decision not to apply *Singleton*'s general rule -- that §253 presents only "pure issues of law" -- is itself erroneous (*see* Parts I and II (A), *supra*) or, in any event, one on which courts are sharply divided (*see id.* & note 7 *supra*). One conclusion is clear: The §253 issues addressed by the court of appeals are hardly ones "where the proper resolution is beyond any doubt" and are instead issues that "have never been passed upon in any decision of this Court." *Singleton*, 428 U.S. at 121. This Court's review is warranted to correct the court of appeals'

error so that, in resolving the important federal issues presented by §253, future litigants "have the opportunity to offer all the evidence they believe relevant to the issues. . . . " *Id.* at 120 (quoting *Hormel*, 312 U.S. at 556).

III. THE COURT OF APPEALS' RULING THAT "FAIR AND REASONABLE COMPENSATION" FOR USE OF RIGHTS-OF-WAY UNDER §253(c) IS LIMITED TO RECOVERING THE COST OF MAINTAINING THE RIGHT-OF-WAY CONFLICTS WITH THE DECISION OF ANOTHER CIRCUIT AND PRESENTS AN IMPORTANT AND RECURRING ISSUE ON WHICH COURTS ARE DIVIDED.

Section 253(c) provides that municipalities may charge "fair and reasonable compensation" for telecommunications service providers' use of local rights-of-way. Twice in its opinion, the court of appeals stated that §253(c) restricts the fees that municipalities may charge for use of rights-of-way to an amount "based on costs of maintaining the rights-of-way." (App. 26a & 33a n. 19.) Review is warranted because the court of appeals' ruling on this issue conflicts with that of another circuit, as well as that of several other courts, and because the court of appeals incorrectly resolved this important and recurring federal statutory issue.

A. The court of appeals' ruling that the 1996 Act limits "fair and reasonable compensation" to fees "based on the costs of maintaining the right of way" conflicts with the holding of the Sixth Circuit in *TCG Detroit v. City of Dearborn*, 206 F. 3d at 624-25. In *Dearborn*, the Sixth Circuit explicitly rejected the argument that "fair and reasonable compensation" within the meaning of §253(c) is limited to recovery of costs, held that "'costs' and 'compensation' are not the same," and affirmed a district court decision finding that a gross revenue-based fee was "fair and reasonable

compensation" within the meaning of §253(c). 206 F. 3d at 624-25. Also, unlike the "no facts needed" approach of the court of appeals here, the Sixth Circuit held that whether a fee is "fair and reasonable compensation" depends on "the totality of the circumstances." *Id.* at 625. In its amended opinion, the court of appeals here for the first time added a reference to the Sixth Circuit's *Dearborn* decision, but ignored the conflict between the non-cost based "fee requirement" upheld in *Dearborn* (App. 27a n.11) and the cost-based limitation endorsed in its own opinion (App 26a & 33a n. 19).

Moreover, the conflict over the meaning of "fair and reasonable compensation" under §253(c) extends beyond the decision below and the Sixth Circuit's *Dearborn* decision. Several other courts have addressed the issue, with most holding that "fair and reasonable compensation" under §253(c) is not restricted to cost reimbursement but instead contemplates rent for use of public property,[9] while others, like the Ninth Circuit here, have concluded that compensation under §253(c) is restricted to reimbursement of a municipality's costs of maintaining or managing the right-of-way.[10] Nor are these conflicts merely implicit. To the contrary, these courts have explicitly recognized their

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9 *E.g., White Plains*, 125 F. Supp. 2d at 96 ("fair and reasonable compensation" under §253(c) not limited to costs; gross revenue-based fee upheld); *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d at 789 (same); *BellSouth Telecommunications v. City of Orangeburg*, 337 S.C. at 43, 502 S.E. 2d at 808 (same); *Omnipoint Communications v. Port Authority of New York and New Jersey*, 1999 WL 494120 at *6-8 (S.D.N.Y. 1999) ("fair and reasonable compensation" allows "local governments to charge rental fees" and is not limited to costs).

10 *E.g., City of Berkeley*, 146 F. Supp. 2d at 1100 (following Ninth Circuit's decision here and holding "fair and reasonable compensation" is limited to recovery of costs); *Bell Atlantic*, 49 F. Supp. 2d at 817 (same); *PECO v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409 (E.D. Pa. 1999) (same).

disagreements with one another on this issue.[11]

The number of decisions and divergent results to date leave little doubt that this issue is and, without this Court's guidance, will continue to be, a recurring question. The issue's importance should be equally clear. Given the increased competition promoted by the 1996 Act and the resulting substantially increased use of municipal streets and rights-of-way by telecommunications service providers, the question of what constitutes "fair and reasonable compensation" for right-of-way use under §253(c) has enormous fiscal implications for not only all local governments across the nation, but their taxpaying residents as well. The Court therefore should grant review.

B. The court of appeals' ruling that "fair and reasonable compensation" under §253(c) is restricted to cost reimbursement is also demonstrably incorrect. The court of appeals offered no explanation for its ruling on this issue (App. 26a & 33a n. 19), and for good reason: It directly conflicts with the plain meaning of "fair and reasonable compensation," how courts have historically construed that phrase, and the legislative history of §253(c).

Certainly the common and ordinary meaning of "fair and reasonable compensation" does not connote mere reimbursement of costs. *Black's Law Dictionary* at 277 (7th ed. 1999), for instance, defines the terms "just compensation" and "adequate compensation" for use of property as "the property's fair market value."

In enacting § 253(c), Congress is of course presumed to be aware of previous interpretations of similar language. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Precedent construing analogous terms lends no support to the court of appeals' crabbed construction of "compensation." The

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[11] *See, e.g., White Plains*, 125 F. Supp. 2d at 96 (agreeing with *Dearborn*, *Omnipoint* and *Orangeburg* courts, and disagreeing with *Bell Atlantic* court, on this point).

Takings Clause of the Fifth Amendment, for instance, contains the very similar phrase "just compensation." And the law is clear that the "compensation" to which a person is entitled under the Takings Clause is not mere reimbursement of costs, but fair market value. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984). The law is equally clear that local governments, no less than private parties, are entitled to fair market value as "compensation" under the Takings Clause. *Id* at 31 & n.15.

Moreover, this Court has long recognized that franchise fees which municipalities receive from utilities for right-of-way use are a form of rent. *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 98-99 (1893). Other courts across the nation have consistently reached the same conclusion, in the context of both local telephone and local cable television franchises.[12]

Congress' use of the phrase "fair and reasonable compensation" in §253(c) evinces a clear intent to preserve, rather than to upend, the longstanding principle that franchise fees are a form of rent and need not be cost-based. And the legislative history of §253(c) confirms that conclusion. As stated by the sponsor of the successful amendment to the House version of what became the 1996

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12 *E.g., City of Dallas v. FCC*, 118 F. 3d 393, 397 (5th Cir. 1997) (5% franchise fee allowed by 47 U.S.C §542 is a "form of rent" for "use of rights-of-way"); *City of Albuquerque v. New Mexico Public Service Commission*, 115 N.M. 521, 533, 854 P.2d 348, 360 (N.M. 1993) (gross receipts-based franchise fee is rent for use of local rights-of-way); *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 407 (S.D. Fla. 1991) (same); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 962-63, 972-74 (N.D. Cal. 1987), *further proceedings* 679 F. Supp. 977, 979-80 (1988)(same); *Erie Telecommunications v. City of Erie*, 659 F. Supp. 580, 595 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988) (same); *City of Richmond v. Chesapeake & Potomac Tel. Co.*, 205 Va. 919, 924, 140 S.E.2d 683, 687 (Va. 1965) (same); *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 44 Cal.2d 272, 283, 282 P.2d 36, 43 (Cal. 1955) (same).

Act that conformed the House bill's language to the language now found in §253(c), the provision is intended to "explicitly guarantee[ ] that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for use of that right-of-way. . . . The Federal Government has absolutely no business telling State and local governments how to price access to their local right-of-way."[13]

In short, Congress intended the phrase "fair and reasonable compensation" in §253(c) to shield against federal intrusions into a municipality's ability to control its own public property and receive rent-based compensation for its use by private businesses. The court should grant review to address the important issue of federalism threatened by the court of appeals' decision below.

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[13] 141 Cong. Rec. H 8460 (daily ed. Aug. 4, 1995) (remarks of Rep. Barton). *Accord id.* at H8460-61 (remarks of Rep. Stupak) (what is now §253(c) allows gross revenue-based fees) & *id.* (remarks of Rep. Bliley) (opponents of amendment also agree that what is now §253(c) allows gross revenue-based fees).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

APPENDIX A
UNITED STATES COURT OF APPEALS
OR THE NINTH CIRCUIT

CITY OF AUBURN; CITY OF BREMERTON; CITY OF DES MOINES; CITY OF FEDERAL WAY; A MUNICIPALITY; CITY OF LAKEWOOD; CITY OF MEDINA; CITY OF OLYMPIA; CITY OF PUYALLUP; CITY OF RENTON; CITY OF SEATAC; CITY OF TACOMA; CITY OF TUKWILA; CITY OF UNIVERSITY PLACE; CITY OF VANCOUVER,	)	Nos. 99-36173 99-36219
Plaintiffs-Appellees-Cross-Appellants,	)	D.C. No. CV-98-05595-FDB
v.	)	ORDER AND AMENDED OPINION
QWEST CORPORATION, *Defendant-Appellant-Cross-Appellee.*	)	

Appeal from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted
February 6, 2001—Seattle, Washington
Filed April 24, 2001
Amended July 10, 2001

Before: Pamela Ann Rymer, Sidney R. Thomas, and
M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown

COUNSEL

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Carol S. Arnold, Preston Gates & Ellis LLP, Seattle, Washington, for the appellee/cross-appellants.

ORDER

The Opinion filed April 24, 2001 is amended as follows:

1. At 247 F.3d at 980, section II.C.1, second paragraph: Replace sentence reading: "A number of courts have held that various requirements imposed by local ordinances constitute a prohibition within the meaning of § 253(a)." with "A number of courts have held that certain requirements imposed by local ordinances constitute a prohibition within the meaning of §253(a)."

2. At 247 F.3d at 981, section II.C.1, third paragraph: Replace sentence reading: "The ordinances at issue in the present case include several features that have the effect of prohibiting the provision of telecommunications services."

with "The ordinances at issue in the present case include several features that, in combination, have the effect of prohibiting the provision of telecommunications services."

3. At 247 F.3d at 981, section II.C.1, third paragraph:

Delete sentence reading: "The Counterclaim Cities require application fees ranging from an undetermined amount (in Olympia) [FN 10] to $2,500 in Auburn and $5000 (in Des Moines and Tacoma)."

4. Delete footnote 10.

5. At 247 F.3d at 981, section II.C.1, fourth paragraph: Delete first two sentences and citation, and replace with the following:

> "Taken together, these requirements 'have the effect of prohibiting' Qwest and other companies from providing telecommunications services, see *City of Dallas*, 52 F. Supp. 2d at 770, and create a substantial and unlawful barrier to entry into and participation in the Counterclaim Cities' telecommunications markets."

At the end of the same paragraph, add the following as a new footnote:

> "The Sixth Circuit noted that a regulation that allows denial of a franchise does not alone constitute a prohibition within the meaning of § 253(a). *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000) (holding that a fee requirement is not pre-empted by § 253(a)). As in *City of Austin*, 975 F. Supp. at 939, our conclusion is based on the variety of methods and bases on which a city may deny a franchise, not the mere franchise requirement, or the possibility of denial alone. *See TCG Detroit*, 206 F.3d at 624 (citing *City of Austin* with approval)."

6. At 247 F.3d at 981-82, section II.C.2, first paragraph:

Delete first two sentences, and replace with: "Of course, a franchise requirement per se is not preempted by the Telecom Act. Only regulations that do not fall within a safe harbor pro-vision, such as § 253(c), are preempted."

7. At 247 F.3d at 982, section II.C.2, paragraph beginning "Applying these guidelines:" Delete first sentence, and replace with: "Applying these guidelines, coupled with common sense, it is apparent that the ordinances establish franchise systems that regulate the telecommunications companies themselves, not merely the rights-of-way."

8. At 247 F.3d at 985 n.19, replace "negotiation and acceptance" with "negotiations of the terms and discretionary acceptance".

With the foregoing amendments to the opinion, the panel has unanimously voted to deny appellees/cross-appellants' petition for rehearing.

The full court has been advised of the appellees/cross-appellants' suggestion for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the matter en banc. Thus, the suggestion for rehearing en banc is rejected.

OPINION

McKEOWN, Circuit Judge:

This case presents issues of first impression concerning the relationship between various Washington municipalities and a major telecommunications provider, Qwest Corporation. We are called upon to decide (1) whether an ambiguous tariff filed with the state utilities commission

trumps the common law and statutory rule that the utility company, rather than the municipality, bears the expense for a facility relocation made necessary by right-of-way improvements, and (2) whether state law and the Federal Telecommunications Act of 1996 preempt certain city ordinances that establish a franchise system to manage telecommunications facilities in rights-of-way. We conclude that the tariff does not require the municipalities to shoulder the relocation costs, and that the ordinances are preempted.

In 1998, the cities of Auburn, Bellingham, Bremerton, Des Moines, Federal Way, Fife, Lakewood, Medina, Olympia, Puyallup, Renton, SeaTac, Shoreline, Spokane, Tacoma, Tukwila, University Place, and Vancouver ("the Cities") brought suit against Qwest in state court. They argued that, as a condition of Qwest's right to use the rights-of-way along city streets and roads, it was required by statutory and common law to relocate or pay for relocation of its facilities. Qwest removed the case to federal court, and filed a counterclaim against Auburn, Des Moines, Olympia, Tacoma, and University Place[1] (the "Counterclaim Cities") seeking a declaratory judgment that state law and the Federal Telecommunications Act of 1996 preempt the municipal ordinances establishing franchise and fee systems.

The district court granted summary judgment to the Cities on the relocation costs claim, and dismissed as unripe Qwest's counterclaim challenging the franchise ordinances. Both the Counterclaim Cities and Qwest appealed. These consolidated appeals involve two distinct issues —

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[1] The City of University Place has since revised its ordinances and was dismissed from the case.

relocation costs and the preemption of city ordinances — which we discuss separately.

DISCUSSION

I. RELOCATION COSTS

Under Washington common and statutory law, when city street improvements require the displacement of telecommunications equipment located in the city's right-of-way, the utility company bears the expense of relocating the equipment.[2] This has been the rule in Washington since before statehood. On February 21, 1996, Qwest (then U S West), notified cities and counties in western Washington that it would no longer bear these relocation costs. In support of its announcement, Qwest took the position that its tariff of rates and services, filed with the Washington Utilities and Transportation Commission ("WUTC") in 1967 and adopted without objection in 1968, shifted the payment burden to the cities. That tariff, WN U-31, has been revised and amended over the years; the current version reads in relevant part:

> When relocation or aerial to underground conversion of existing facilities is requested or required by law, the cost of constructing the new and removing the old facilities will be borne by the customer or others requesting the relocation or conversion.

WN U-31 para. 4.6.C

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[2] *See* RCW § 80.36.040; *State of Washington v. Public Util. Dist. No. 1 of Clark County*, 349 P.2d 426, 429-30 (Wash. 1960) (describing the common law rule).

Relying on this language, Qwest refused to relocate or pay for relocation of its facilities to accommodate street improvement or relocation. This resulted, in at least one instance, in a Qwest-owned telephone pole standing in the middle of a newly-widened road. Later, Qwest agreed to relocate its equipment, but notified the cities of its intent to seek reimbursement for related costs.

After this appeal was filed and partially briefed, the Washington legislature passed major telecommunications legislation, entitled, "An Act relating to the use of city or town rights of way by telecommunications and cable television providers." Engrossed Substitute Senate Bill 6676 ("ESSB 6676"). The parties agree that ESSB 6676, codified at WASH. REV. CODE ("RCW") § 35.99.010 et seq., super-sedes Qwest's tariff and prospectively imposes the cost of relocating telecommunications facilities in city streets on the utility company.[3] Therefore, the question before us is limited to who bears the costs of relocation prior to the effective date of the new statute. We review de novo the district court's grant of summary judgment. *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000).

A. STATUTORY AND COMMON LAW BACKGROUND

[1] We begin with the principle—with which both parties agree—that under Washington common law, the utility must pay the cost of relocation if required by public

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[3] The Counterclaim Cities moved for partial summary judgment on Qwest's counterclaim, and sought an order declaring prospectively that they have authority to require undergrounding. The district court denied the motion when it dismissed the counterclaim for lack of ripeness. The Counterclaim Cities' appeal of this issue is rendered entirely moot by ESSB 6676, which makes clear that cities "may require service providers to relocate authorized facilities . . . ." RCW § 35.99.060. By definition, this relocation includes undergrounding.

necessity. This stems from the conditional nature of a utility's right to have facilities in the public right-of-way. When the government allows a telecommunications company to place facilities in that right-of-way, the facilities' presence is contingent on the company's cooperation with maintenance and improvement of the street. 12 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 34.74.10 (3d ed. 1970) ("it is generally held that the municipality may require a change in the location of pipes or other underground facilities of the grantee of a franchise, where public convenience or security require it"). This general rule is followed in virtually every jurisdiction, *id.* at n.6 (noting that only Arkansas is in conflict), and has been embodied in Washington common and statutory law since before statehood in 1889.

The statutory rule can be traced to the old federal Post Roads Act, which required telegraph companies to maintain their lines so as "not to obstruct . . . or interfere with the ordi-nary travel on such military or post roads." U.S. REV. STATS § 5263, 14 Stat. 221 (1866). The territorial legislature similarly provided that the right to construct telegraph lines was subject to the requirement that such lines "not unnecessarily obstruct[ ]" rights-of-way. 1866 Wash. Laws, approved January 18, 1866.

This rule continued to apply after statehood. Although the Washington Constitution recognized the right of telecommunications companies to construct and maintain facilities, it specifically authorized the legislature to adopt "reasonable regulations" relating to those facilities. WASH. CONST. Art. XII, § 19. Indeed, the state legislature in its first session adopted a statute allowing telecommunications companies to construct facilities in rights-of-way "in such manner and at such points as not to incommode the public

use of the . . . highway[.]" 1889-90 Wash. Laws (now codified at RCW § 80.36.040).

[2] The "as not to incommode the public use" language of § 80.36.040 has been interpreted by the Washington Supreme Court to allow a city to require the utility company to pay for relocation costs when a public street is improved or altered. *City of Seattle v. W. Union Tel. Co.*, 153 P.2d 859, 868-69 (Wash. 1944); *City of Edmonds v. Gen. Tel. Co.*, 584 P.2d 458, 463 (Wash. Ct. App. 1978). The Washington Supreme Court has continued to hold that any right accorded to a utility company to maintain structures in public streets is subject to the state's police power, and the company must bear the expense of changes required by public convenience and necessity unless otherwise agreed. *See Wash. Natural Gas Co. v. City of Seattle*, 373 P.2d 133, 135-36 (Wash. 1962); *P.U.D. No.* 1, 349 P.2d at 429.

[3] Today, the classic statement of the rule in Washington is that "public utility companies operating under a franchise must bear the cost of removing and of relocating their facilities, as it is made necessary by highway improvements." *P.U.D. No.* 1, 349 P.2d at 429-30. This rule "may be changed by contract between the utility and a municipality so that relocation expenses are borne by the municipality, or may be changed by statute so that relocation expenses in certain cases are borne by the state, or the municipality." *Gen. Tel. Co. v. City of Bothell*, 716 P.2d 879, 882 (Wash. 1986) (quoting MCQUILLIN § 34.74(a)).

B. EVOLUTION OF QWEST'S TARIFF

Qwest argues that this rule was changed by tariff WN U-31, originally filed by Qwest in 1967 and adopted by the WUTC in 1968. The original tariff read, in relevant part:

> [I]f the Company is requested to relocate its facilities underground, or if the Company is required by law to relocate its facilities underground, the cost of such relocating construction shall be borne by the owners of the real property served or by others requesting such relocation construction.
>
> Pacific Northwest Bell Telephone Co.
> Rules and Regulations No. 23

The current language, first adopted in 1989 — more than twenty years later — reads:

> When relocation or aerial to underground conversion of existing facilities is requested or required by law, the cost of constructing the new and removing the old facilities will be borne by the customer or others requesting the relocation or conversion.
>
> WN U-31 para. 4.6.C

The difference between the two versions is significant; the original tariff is directed solely at undergrounding (that is, locating utility facilities underground), which has been encouraged in recent decades for aesthetic and safety reasons. Tariff WN U-31, however, has a different scope; it is not restricted to undergrounding, but purports to apply to *all* relocation. This broader language first appears in 1989; nothing in the record explains the purpose or intent of the change, and Qwest acknowledges that it first invoked the tariff to demand relocation costs in its 1996 letter to the Cities.

C. ANALYSIS

The question, then, is whether Qwest's current tariff altered its common law and statutory obligation to foot the bill for relocation costs. Qwest takes the position that the tariff language stating that relocation costs "will be borne by the customers or others requesting the relocation or conversion" includes the cities within the term "others." Qwest further argues that this tariff is equivalent to statutory law, and there-fore alters the prior rule.

[4] It is true that a tariff properly filed and authorized by law can alter the common law, at least between a utility and its customers. In *Moore v. Pac. Northwest Bell,* the Washington Court of Appeals noted that "[t]hese tariff schedules have the force of law and bind telephone customers." 662 P.2d 398, 403 (Wash. Ct. App. 1983). In *Allen v. Gen. Tel. Co.,* the Court of Appeals concluded that a tariff limiting the telephone company's liability for misprinting a directory "becomes a part of the law of this State." 578 P.2d 1333, 1337 (Wash. Ct. App. 1978).

[5] It is well settled, however, that tariffs are read to be consistent with preexisting statutory law, and cannot repeal or supersede a statute. *See People's Org. for Washington's Energy Res. v. Washington Util. and Transp. Comm'n,* 679 P.2d 922, 927 (Wash. 1984) (tariff may not set terms that conflict with statute); *Nat'l Union Ins. Co. v. Puget Sound Power & Light,* 972 P.2d 481, 484-86 (Wash. Ct. App. 1999) (holding that a tariff that purported to absolve utility from liability was ambiguous, and should not be interpreted in conflict with statutes). In this case, RCW § 80.36.040 authorized the city to require the utility to pay relocation costs. Qwest's tariff can-not, by itself, nullify that statute. This is especially true where, as here, the tariff is ambiguous.

General Telephone Co. v. Bothell, the case that Qwest views as dispositive, does not hold otherwise. *Bothell* involved a city ordinance that purported to exempt a city from the provisions of a utility tariff relating to undergrounding. In 1971, the WUTC adopted WAC § 480-120-076, providing that "[e]ach telephone utility shall set forth in its tariff its conditions for providing underground facilities." In 1977, pursuant to that regulation, General Telephone filed a tariff passing the costs to "the owners of real property served along the route of the constructed facility or to others requesting such relocation construction." *Bothell*, 716 P.2d at 881. Bothell, in 1981 and 1982, enacted ordinances requiring the utility company to pay for undergrounding of aerial wires — that is, purporting to supersede the statewide tariff authorized by the regulation. General Telephone challenged the validity of the ordinances and argued that the tariff required Bothell, not General Telephone, to pay for undergrounding. The Washington Supreme Court first recognized that the tariff in that case was the law of the state before Bothell passed its ordinances. *Bothell*, 716 P.2d at 882-84. Stating that a city may not usurp the functions of the state public service commission, *Bothell* held that the city's ordinances were invalid where they conflicted with the tariff. *Id.*

Qwest argues that *Bothell*'s statement that "[t]ariffs enacted pursuant to such WUTC regulation have the force of state law and are preemptive authority over subsequently enacted city ordinances," 716 P.2d at 882, requires us to hold that Qwest's tariff supersedes or preempts statutory law. *Bothell* does no such thing. First, the tariff in *Bothell* was adopted pursuant to a specific administrative code provision directing the utility to include undergrounding costs in its tariff. Unlike relocation costs, neither Washington common law nor RCW § 80.36.040 encompassed allocation of undergrounding costs.

Bothell did not involve the tension between the unambiguous common law (later codified) and an ambiguous tariff. Second, the *Bothell* opinion makes perfect sense when viewed in context — it would be absurd for a city to be able, by ordinance, to exempt itself from a prior tariff that was validly enacted and authorized by regulation. But that is not the case here, where the tariff at issue was not required by regulation, and where the Cities do not seek, by ordinance, to avoid compliance with a tariff.

[6] Because it is well settled that a tariff cannot repeal a statute, we need not reach the question whether Qwest's tariff has the force of law or whether the tariff does in fact purport to change the prior rule.[4] We hold that Qwest's tariff did not alter the long-established and unbroken rule established at common law and in RCW § 80.36.040 that the utility company must pay relocation costs.

II. Preemption Of The Cities' Ordinances

The next issue that confronts us is the question of state and federal preemption of local ordinances regulating telecommunications.

[7] We begin with the Telecommunications Act of 1996 (the "Act" or the "Telecom Act"), Pub. L. 104-104, 110 Stat. 56 (1996), which was passed to promote competition among and reduce regulation of telecommunications providers.[5]

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[4] In addition, we need not consider whether *Pierce County v. U S West*, No. 97-2-08395-3 (Wash. Sup. Ct. March 13, 1998) (holding that "or others" language in the identical tariff does not include municipalities), collaterally estops Qwest from challenging the tariff.

[5] The full title of the Act is "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." The conference committee report noted that the purpose of the statute is to provide for a

To this end, the Act prohibits state and local governments from creating "barriers to entry," legal requirements that prohibit or have the effect of prohibiting a company from providing telecommunication service. 47 U.S.C. § 253 (Supp. IV 1999). Section 253 begins with a broad prohibition against state and local regulation, followed by certain narrow exceptions that leave a "safe harbor" for limited local regulation. One of these safe harbors, established by § 253(c), allows a local government to manage and collect fees for the use of public rights-of-way by telecommunication providers.

After the passage of the Act, the Counterclaim Cities (Auburn, Olympia, Tacoma, Des Moines, and University Place) passed ordinances that govern the use of public rights-of-way by telecommunications companies by requiring companies to obtain a "franchise," or permit. These ordinances are not identical, but are substantially similar. Under each ordinance, any telecommunications service provider that wishes to operate in the city must apply to the city for a franchise. Only franchised telecommunications companies may obtain permits to install facilities in public rights-of-way. Franchised companies are subject to extensive cost reporting obligations and controls over such matters as changes of stock ownership. The ordinances also require the company to provide excess capacity, and to offer services to the city at best-available rates. Three of the Counterclaim Cities charge a fee of between $2500 and $5000 to apply for a franchise. Each city reserves the right to grant, deny, or revoke a franchise for unnamed criteria, and in the discretion of the city. Finally, the ordinances provide that a city may remove the facilities of a company operating

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"procompetitive, de-regulatory national policy framework." H. R. Rep. No. 104-458 (1996).

without a franchise, and a company operating without a franchise is subject to civil and criminal penalties.

Qwest's counterclaim seeks a declaratory judgment that the Counterclaim Cities' ordinances are preempted by state law and by the Telecom Act.

A. RIPENESS

The district court dismissed Qwest's counterclaim as unripe, primarily on the grounds that "the analysis would be better conducted following specific attempts by the Counter-claim Cities to enforce their telecommunications ordinances." *Auburn v. U S West*, 79 F. Supp.2d 1214, 1218 (W.D. Wash. 1999). We review de novo the district court's dismissal of the counterclaim for lack of ripeness. *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1131 (9th Cir. 1998).

[8] The "basic rationale" of the ripeness requirement is "[t]o prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]" *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977). To determine whether Qwest's counterclaim is ripe for review, we evaluate (1) whether the issues are fit for judicial decision, and (2) whether the parties will suffer hardship if we decline to consider the issues. *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996) (citing *Abbott Lab.*, 387 U.S. at 149).

The ripeness inquiry has a constitutional component rooted in the "case or controversy" requirement of Article III, and a prudential component that focuses on whether the record is adequate to ensure effective review. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134,

1139 (9th Cir. 2000) (en banc). We address the constitutional component first, as it is jurisdictional, then proceed to the two-prong prudential inquiry required by *Abbott Laboratories*.

1. Constitutional Component

[9] We may not hear a case unless "there exist[s] a constitutional 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract.' " *Thomas*, 220 F.3d at 1138 (quoting *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)). This tenet of ripeness requires us to consider whether the plaintiffs face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," or, by contrast, if the alleged injury is too "imaginary" or "speculative" to support jurisdiction. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). We have little trouble concluding that this case satisfies the "case or controversy" requirement, and therefore the constitutional component of ripeness.

[10] The case before us is remarkably similar to *Abbott Laboratories* and its companion cases, decided the same day. There, the Supreme Court held, the very promulgation of a law may itself affect a party enough to satisfy the constitutional requirement: "[t]here is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions." *Abbott Lab.*, 387 U.S. at 154. If "[p]romulgation of the challenged regulations present[s] plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous

restrictions and risking serious penalties for violation," the controversy is ripe. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993) (construing *Abbott Lab.*). This is particularly true when the regulations are burdensome and immediate. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 170 (1967) (noting the "immediate severity of the regulations' impact upon the plaintiffs"); *id.* at 173 ("[I]t is quite clear that if respondents, failing judicial review at this stage, elect to comply with the regulations and await ultimate judicial determination of the validity of them in subsequent litigation, the amount of preliminary paper work, scientific testing, and recordkeeping will be substantial.").

Qwest faces exactly this conundrum. As in *Abbott Laboratories*, the ordinances have "a direct effect on the day-to-day business" of telecommunications companies. There can be no question that Qwest is violating the ordinances — it owns and maintains facilities in the Cities' rights-of-way, and neither possesses nor has applied for a franchise. This is not a case like *Thomas*, where we held that a landlord's intent to violate a law was not enough. As we explained in *Thomas*, "[a]lthough we do not always require plaintiffs to await arrest or prosecution before entertaining a challenge to the constitutionality of a statute . . . the threat of enforcement must be at least 'credible,' not simply 'imaginary or speculative.' " *Thomas*, 220 F.3d at 1140 (citation omitted). *See also San Diego*, 98 F.3d at 1127 (distinguishing hypothetical violation from situation where party has "previously engaged in and would continue to engage in acts regulated under the challenged legislation" and where prosecution is under agency's control). Only an about-face by the Counterclaim Cities would save Qwest from civil or criminal penalties. Nothing about this situation makes Qwest's dilemma any less severe than that faced by Abbott Laboratories. Nor is Qwest's dilemma speculative or conjectural. *Abbott Laboratories* does not

require Damocles' sword to fall before we recognize the "realistic danger of sustaining a direct injury" that is the heart of the constitutional component of ripeness. *Babbitt*, 442 U.S. at 298.

[11] In sum, the enactment of these regulations "puts [Qwest] in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Abbott Lab.*, 387 U.S. at 152. The decision to comply will surely be costly, and "[t]he alternative to compliance . . . may be even more costly. That course would risk serious criminal and civil penalties. . . ." *Id.* at 153. This Hobson's Choice suggests the ripeness of the issue for review.[6]

2. Fitness of the Issues for Judicial Decision

[12] Under the test laid out in *Abbott Laboratories*, we must examine the fitness of the issues for review. If a controversy is "essentially legal in nature," *W. Oil & Gas Ass'n v. Sonoma County*, 905 F.2d 1287, 1291 (9th Cir. 1990), it is fit for judicial decision. This is the case when no "further factual amplification is necessary." *Id.*; *see also Abbott Lab.*, 387 U.S. at 149 (issue was ripe where parties agreed that it was purely legal).

[13] Qwest's counterclaim presents a pure question of law: Are the Counterclaim Cities' ordinances preempted by state or federal law? *See Int'l Truck Ass'n v. Henry*, 125 F.3d

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[6] The Counterclaim Cities also argue that Qwest does not have standing to challenge the ordinances. Standing, of course, overlaps substantially with ripeness. *Thomas*, 220 F.3d at 1138-39 (discussing similarity between standing and ripeness). In this case, the Counterclaim Cities' standing argument is inextricably linked with their ripeness challenge. Because we conclude that this case is ripe, we necessarily determine that Qwest — to whom the ordinances are directed—has standing to challenge the ordinances.

1305, 1309 (9th Cir. 1997) (stating that preemption is a matter of law). No further factual record would narrow or clarify that issue. As in *Abbott Laboratories*, there is no factual dispute about the activity conducted by Qwest, nor the applicability of the ordinances to its activity. Therefore, the controversy is essentially legal in nature.

Although we ordinarily "do[] not consider an issue not passed upon below," the decision to resolve a question "for the first time on appeal is one left primarily to the discretion of the courts of appeals." *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976). "[I]t is sometimes appropriate for an appellate court to pass on issues of law that the trial court did not consider." *Bibeau v. Pacific Northwest Research Foundation Inc.*, 188 F.3d 1105, 1111 n.5 (9th Cir. 1999).

In this case, we are faced with pure issues of law that were briefed extensively before the district court and again before the court of appeals. As such, there is a solid basis on which to consider the merits of the counterclaim.

3. Hardship to the Parties

[14] For the second, or "hardship," prong of *Abbott Laboratories* to favor the party seeking relief, "[p]ostponing review must impose a hardship on the complaining party that is *immediate*." *Anchorage v. United States*, 980 F.2d 1320, 1326 (9th Cir. 1992). Qwest contends that the hardship in this case is the costly and cumbersome requirement to apply for and comply with a franchise, as the failure to do so exposes it to civil and criminal penalties. We agree that the franchise ordinances impose multiple obligations upon Qwest. For example, Qwest is required to pay an application fee of up to $5000; file an application containing detailed information unrelated to the rights-of-way; negotiate certain terms of the franchise with the cities;

undergo extensive reporting and approval processes for transfers of ownership, including stock; provide excess capacity; and offer the cities favorable rates. Were we to decline to hear the case on grounds of ripeness, Qwest would be forced to obtain a franchise and then return to court to argue that state and federal laws preempt the city ordinances — exactly the same argument that it makes here. This was precisely the situation in *Abbott Laboratories*, which the Supreme Court found ripe for review: "Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance," the case is justiciable. 387 U.S. at 153.

[15] Having determined that this case is ripe, we proceed to consider the preemption claims on the merits.

B. PREEMPTION BY STATE LAW

Qwest argues that the local ordinances are preempted by state law, and further contends that it is exempted from any municipal franchise requirement by virtue of its statewide constitutional franchise.[7] The Counterclaim Cities counter that Washington's public utility laws do not preempt their management of municipal rights-of-way.

[16] WASH. CONST. art. XI, § 11 requires that a local law yield to a state statute on the same subject matter if that statute "preempts the field, leaving no room for concurrent

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[7] Qwest claims that its corporate predecessor possessed a grant dating to territorial times, giving it the right tc be present in the right of way. That grant, Qwest explains, was preserved in the territorial laws and was guaranteed into statehood by the Washington Constitution, and therefore exists independent of and immune from additional restrictions.

jurisdiction," or "if a conflict exists such that the two cannot be harmonized." *Brown v. City of Yakima*, 807 P.2d 353, 354 (Wash. 1991). *See also Employco Personnel Servs., Inc. v. City of Seattle*, 817 P.2d 1373 (Wash. 1991) (invalidating ordinance conflicting with state law).

Four days after Qwest filed its opening brief in this case, the Washington legislature enacted ESSB 6676, codified at RCW § 35.99.010 et seq. That law significantly altered the ability of municipalities to regulate telecommunications utilities, especially wireline facilities of those who hold statewide grants or franchises.

The new law establishes a system by which cities may grant "master permits," or franchises, to telecommunications companies. The scope of the master permits is described in some detail, and limited in several ways. Importantly, ESSB 6676 excludes from its scope "a service provider *asserting an existing state-wide grant* based on a predecessor telephone or telegraph company's existence at the time of the adoption of the Washington Constitution to occupy the right of way." RCW § 35.99.010(3) (defining "master permit") (emphasis added); *see also* RCW § 35.99.030 ("[a] city or town may request, but not require, that a service provider with an existing state-wide grant to occupy the right of way obtain a master permit [i.e., franchise] for wireline facilities"). In addition, ESSB 6676 bars municipalities from adopting franchise systems that "regulate the services or business operations of the service provider, except where otherwise authorized in state or federal law." RCW § 35.99.040(1)(a). Each of these provisions affects the present case.

[17] First, as noted above, ESSB 6676 specifically exempts companies asserting a state-wide grant from any requirement to obtain a municipal franchise for wireline

facilities. At oral argument, both parties agreed that Qwest asserts such a state-wide grant. Because ESSB 6676 exempts a company asserting a statewide constitutional grant from municipal franchises, the relief sought in Qwest's counterclaim — so far as it deals with wireline facilities — has been granted by statute.

[18] The ordinances' regulation of Qwest's wireline facilities clearly conflicts with RCW §§ 35.99.010(3) and 35.99.030. We therefore hold that ESSB 6676 preempts the franchise ordinances insofar as they purport to require a telecommunications company asserting a statewide constitutional grant to obtain a franchise for its wireline facilities.[8]

Having addressed wireline facilities, we are still faced with the issue of preemption with respect to wireless facilities. The remainder of the state and municipal franchise scheme is not so simple to resolve, in part because of the recent nature of ESSB 6676. The new law's prohibition on ordinances that "regulate the services or business operations of the service provider," RCW § 35.99.030(1)(a), could be interpreted to preempt ordinances that, for instance, require excess capacity or control stock transfers. In addition, some provisions of the ordinances might be preempted by state statutes regulating in the same subject area.[9] Further, the new law incorporates certain

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[8] Because ESSB 6676 grants Qwest a portion of the relief it seeks in its counterclaim, that portion of the counterclaim might also be considered moot. *See Kremens v. Bartley*, 431 U.S. 119, 129 (1977) (holding that a new statute resolving the dispute moots a claim). Whether characterized as preemption or mootness, the result is the same. The new law supersedes Qwest's claim.

[9] For example, the state regulates issuance of stock and securities at RCW § 80.08.030; rates, fees, and capacity at § 80.36.080; rates and service § 80.36.130; and franchise fees and charges at § 35.21.860.

requirements of the Telecom Act by limiting the authority of cities and towns to regulate the placement of facilities if the regulation "[v]iolate[s] section 253 of the Telecommunications Act of 1996." RCW § 35.99.040(2)(c). Any analysis of state preemption, then, requires us to look to federal law.

For these reasons, we decline to interpret as a matter of first impression the interplay between prior state laws and ESSB 6676, as applied to the Counterclaim Cities' ordinances regulating Qwest's wireless facilities. No Washington court has published an opinion involving any aspect of the new law; neither the WUTC nor the Washington State Attorney General has published any guidance as to its meaning or scope. Because we believe that a state court is better equipped to first interpret ESSB 6676 and its relationship with other state laws, and because the federal preemption issue is placed squarely before us by the new state law, we choose not to resolve the issue of whether other aspects of Washington state law preempts the ordinances' regulation of wireless facilities.

C. PREEMPTION BY FEDERAL LAW

Qwest also argues that the Telecom Act preempts the ordinances, a claim that the district court dismissed as unripe. The question before the district court and on appeal is whether, on the facts alleged, Qwest is entitled to judgment as a matter of law. *See Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526, 529 (9th Cir. 1997). We conclude that it is.

[19] The Supremacy Clause, U.S. CONST. art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). Within constitutional limits, Congress is empowered

to preempt state law in several ways, including by expressly stating its intention to do so. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In this case, there can be no doubt that the Act preempts expressly; it states that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). The question for the court, then, is whether the ordinances "interfere with, or are contrary to" the Act. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985).

1. Section 253(a) — Regulations Prohibiting or Having the Effect of Prohibiting Service

[20] Section 253(a) bars all state and local regulations that "prohibit or have the effect of prohibiting" any company's ability to provide telecommunications services unless the regulations fall within the statute's "safe harbor" provisions (of which only § 253(c), related to local regulation of rights-of-way, is relevant here). The preemption is virtually absolute and its purpose is clear — certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena. "Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications." *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998).

[21] Section 253(a) preempts "regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that 'may . . . have the effect of prohibiting' the provision of such services." *Bell Atl. v. Prince George's County*, 49 F. Supp. 2d

805, 814 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000). A number of courts have held that certain requirements imposed by local ordinances constitute a prohibition within the meaning of § 253(a). For example, an onerous application process, *Bell Atl.*, 49 F. Supp. 2d at 814 ("[A]ny 'process for entry' that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decisionmakers to grant or deny permission to use the public rights-of-way 'may . . . have the effect of prohibiting' the provision of telecommunications services in violation of the [Act]."); a requirement to obtain a franchise, *see AT&T Communications v. City of Dallas*, 52 F. Supp. 2d 763, 770 (N.D. Tex. 1999) (a representation by the city that "without a new franchise . . . AT&T may not offer [services]" is "sufficient proof of the requisite prohibitive effect that triggers the preemptive force of § 253(a)."), vacated and remanded on other grounds, ___ F.3d ___, 2001 WL 197926 (5th Cir. Mar. 15, 2001); threat of penalties for failure to obtain a franchise, *AT&T Communications v. City of Austin*, 975 F.Supp. 928, 939 (W.D. Tex. 1997) ("The threat of criminal sanctions and fines for the failure of an entity to obtain municipal consent can indubitably only be described as a prohibition."); or a combination of these factors, *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81 (S.D.N.Y. 2000) (regulations coupled with long approval process are a prohibition), may constitute a prohibitive effect. Taken together, these cases persuasively indicate that a regulatory structure that allows a city to bar a telecommunications provider from operating in the city "prohibit[s] or ha[s] the effect of prohibiting" the company's ability to provide telecommunications services under 47 U.S.C. § 253(a).

The ordinances at issue in the present case include several features that, in combination, have the effect of

prohibiting the provision of telecommunications services. In order to obtain a franchise, telecommunications companies must submit a lengthy and detailed application form, including maps, corporate policies, documentation of licenses, certain specified items, and "[s]uch other and further information as may be requested by the City." AUBURN MUN. CODE § 20.06.020(J). After application, two of the cities (Auburn and Olympia) require a public hearing before granting or revoking a franchise. Each of the franchise systems authorizes the Cities to consider discretionary factors that have nothing to do with the management or use of the right-of-way. The ordinances all regulate transferability of ownership, even requiring franchises to report to stock sales. Some non-tax fees charged under the franchise agreements are not based on the costs of maintaining the right of way, as required under the Telecom Act.[10] And, the ultimate cudgel is that each city reserves discretion to grant, deny, or revoke the franchises and the Cities may revoke the franchise if the terms in the ordinance are not followed, even allowing the Cities to remove the company's facilities. Civil and criminal penalties are authorized as well.

[22] Taken together, these requirements 'have the effect of prohibiting' Qwest and other companies from providing telecommunications services, see *City of Dallas*, 52 F. Supp. 2d at 770, and create a substantial and unlawful barrier to entry into and participation in the Counterclaim Cities' telecommunications markets. Nearly identical city or county franchise structures have been found to constitute prohibitions under § 253(a). *See, e.g., Bell Atl.*, 49 F. Supp. 2d at 816; *City of Dallas*, 52 F. Supp. 2d at 770; *Bellsouth*

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[10] The parties agree that Washington law allows for a six percent gross receipts tax.

Communications v. City of Coral Springs, 42 F. Supp. 2d 1304 (S.D. Fla. 1999).[11]

2. Section 253(c) — Management of Public Rights-of-Way

[23] Of course, a franchise requirement per se is not pre-empted by the Telecom Act. Only regulations that do not fall within a safe harbor provision, such as § 253(c), are pre-empted. As noted above, § 253(c) permits local regulations that "manage the public rights-of-way" and "require fair and reasonable compensation" for the "use" thereof. The Counter-claim Cities argue that each of the contested ordinances has a specific purpose that is related to the cities' ability to evaluate, permit, and manage telecommunications facilities in the rights-of-way.

[24] The Telecom Act does not define "manage[ment of] the public rights-of-way," but we are not completely without guidance. A number of federal courts have relied upon the Federal Communications Commission ("FCC"), the agency charged with interpreting and enforcing the Act, for interpretive assistance. *See, e.g., TCG New York*, 125 F. Supp. 2d at 90; *PECO v. Township of Haverford*, 1999 WL 1240941 (E.D. Pa. Dec. 20, 1999); *Bellsouth Communications v. Town of Palm Beach*, 127 F. Supp. 2d 1348, 1352-53 (S.D. Fla. 1999); *City of Coral Springs*, 42 F. Supp. 2d at 1308; *Bell Atl.*, 49 F. Supp. 2d at 815; *City of Dallas*, 8 F. Supp. 2d at 591-92.

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[11] The Sixth Circuit noted that a regulation that allows denial of a franchise does not alone constitute a prohibition within the meaning of § 253(a). *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6thCir. 2000) (holding that a fee requirement is not preempted by § 253(a)). As in *City of Austin*, 975 F. Supp. at 939, our conclusion is based on the variety of methods and bases on which a city may deny a franchise, not the mere franchise requirement, or the possibility of denial alone. *See TCG Detroit*, 206 F.3d at 624 (citing *City of Austin* with approval).

As the FCC has explained, right-of-way management means control over the right-of-way itself, not control over companies with facilities in the right-of-way:

> [S]ection 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way . . . . [T]he types of activities that fall within the sphere of appropriate rights-of-way management . . . include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

In re TCI Cablevision of Oakland County, Inc., 12 F.C.C.R. 21396 (F.C.C. 1997), ¶ 103. The FCC, in turn, has looked to the legislative history for additional examples of right-of-way management. Senator Dianne Feinstein, during the floor debate on § 253(c), offered examples of the types of restrictions that Congress intended to permit under section 253(c), including requirements that:

> (1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent with the

> requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation."

In re Classic Telephone, Inc., 11 F.C.C.R. 13082 (F.C.C. 1996), ¶39 (quoting 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco)).

[25] Applying these guidelines, coupled with common sense, it is apparent that the ordinances establish franchise systems that regulate the telecommunications companies themselves, not merely the rights-of-way. We focus on four significant features of the ordinances that violate § 253(c).

[26] First, the ordinances require Qwest to undergo an extensive application process that is not directly related to management of the public rights-of-way. As described above, companies must submit a lengthy and detailed application form. AUBURN MUN. CODE § 20.06.020(J). This application includes data gathered by the cities in order to determine the financial soundness, technical qualifications, and legal ability to provide telecommunications services;[12] a description of all services provided currently or in the future;[13] and unnamed discretionary factors that may have

[12] AUBURN MUN. CODE § 20.06.020 (C), (D), (G); DES MOINES MUN. CODE § 20.02.012(8); OLYMPIA MUN. CODE § 11.04.020(I); TACOMA MUN. CODE § 16.04.4.2.5.2, 16.04.4.2.9.

[13] AUBURN MUN. CODE § 20.06.020 (C); DES MOINES MUN. CODE § 20.02.012(4); OLYMPIA MUN. CODE § 11.04.020(B); TACOMA MUN. CODE § 16.04.4.2.4.

nothing to do with the management or use of the right-of-way.[14]

Regulations requiring "the applicant [to] submit proof of its financial, technical, and legal qualifications" do not regulate the public rights-of-way. *City of Palm Beach*, 127 F. Supp. 2d at 1355. *See also City of Dallas*, 8 F. Supp. 2d at 593 ("Dallas also does not have the power to require a comprehensive application and consider such factors as the company's technical and organizational qualifications to offer telecommunications services."); *City of Coral Springs*, 42 F. Supp. 2d at 1310 ("financial, technical and legal qualifications"); *TCG New York*, 125 F. Supp. 2d at 91. In addition, a description of telecommunications services to be provided does not directly relate to management of the rights-of-way. See *id.*; *City of Coral Springs*, 42 F. Supp. 2d at 1309 ("[T]he City does not have the authority to request information regarding systems, plans, or purposes of the telecommunications facilities."). The upshot of the application process is to regulate the provision of telecommunications services rather than to regulate the right-of-way.

[27] Second, the ordinances impose reporting requirements or other controls over matters not directly related to management of the rights-of-way. For example, the ordinances regulate ownership and certain transfers of shares of ownership of telecommunications companies, regardless of whether ownership affects the right-of-way.[15]

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[14] AUBURN MUN. CODE § 20.06.020 (J); DES MOINES MUN. CODE § 20.02.012(9); OLYMPIA MUN. CODE § 11.06.020(G); TACOMA MUN. CODE § 16.04.4.3.4.

[15] AUBURN MUN. CODE § 20.10.290 (50% control); DES MOINES MUN. CODE § 20.06.70 (5% control); OLYMPIA MUN. CODE § 11.10.290 (50% control); TACOMA MUN. CODE § 16.01.8.3.3 (transfer of franchise).

Although the Counterclaim Cities may wish to "have a right to know" who owns shares in the telecommunications companies that use the public rights-of-way, the municipal regulation of stock transfers extends far beyond management of the rights-of-way. Because these regulations are more than necessary to "man-age the rights-of-way," they do not fall within the safe harbor of section 253(c).

[28] Third, the ordinances require, either through the application process or by other means, that franchise agreements contain certain conditions unrelated to management of the rights-of-way. For example, three of the cities require that franchisees offer "most-favored-community" status — that is, the best available rates and terms.[16] These ordinances bear no relation to management of the rights-of-way, but focus solely on rates, terms and conditions of service. *See, e.g., TCG New York*, 125 F. Supp. 2d at 93 (holding that a most-favored clause "is more akin to a regulation of . . . rates, terms, and conditions of service unrelated to . . . use of the public rights-of-way"); *In re TCI Cablevision*, 12 F.C.C.R. 21396 at ¶ 105 (noting that "most favored nation" clauses are "difficult to justify under § 253(c) on the grounds that they are within the scope of permissible local rights-of-way management authority."). In addition, ordinance requirements that companies provide free or excess capacity[17] for the use of the cities or otherusers go beyond management of the rights-of-way. *See City of Dallas*, 8 F. Supp. 2d at 593 (such requirements are "totally unrelated to use of the city's rights-of-way, and are thus beyond the scope of the City's authority").

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[16] AUBURN MUN. CODE § 20.06.180(N); DES MOINES MUN. CODE § 20.01.10; OLYMPIA MUN. CODE § 11.10.370.

[17] AUBURN MUN. CODE § 20.10.470; DES MOINES MUN. CODE § 20.08.108; OLYMPIA MUN. CODE § 11.10.050(D); TACOMA MUN. CODE § 16.01.6.2.5.

[29] Fourth, and perhaps most problematic, the ordinances grant the Counterclaim Cities unfettered discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise based on unnamed factors.[18] This grant goes far beyond the limits of § 253(c), encompassing anything a city deems to be in the public interest. Like the other courts that have faced this question, we conclude that such ordinances are too vague and too broad to comply with § 253(c). *See, e.g.*, *TCG New York*, 125 F. Supp. 2d at 92; *City of Coral Springs*, 42 F. Supp. 2d at 1306; *Bell Atl.*, 49 F. Supp. 2d at 816 ("most objectionable is the fact that the ordinance vests the county with complete discretion to grant or deny a franchise application based on a wide-ranging set of factors that include 'whether the proposal will serve and protect the public interest.' "); *City of Dallas*, 8 F. Supp. 2d 582, 592-93 ("The City does not, however, have the authority to grant or deny that franchise based on its own discretion. Rather, granting a franchise may only be conditioned on a company's agreement to comply with the city's reasonable regulations of its rights-of-way and the fees for use of those rights-of-way.").

We have specifically discussed only those aspects of the ordinances that most seriously violate § 253(c), but others

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[18] AUBURN MUN. CODE § 20.06.040(M) ("such other factors as may demonstrate that the Franchise to use the public ways will serve the community interest."); DES MOINES MUN. CODE § 20.03.18 (same); OLYMPIA MUN. CODE § 11.04.030(J) (same); TACOMA MUN. CODE § 16.01.8.2.7 ("The City Council may, in its sole discretion which is hereby reserved, (1) approve or disapprove a License; and (2) require such terms and conditions in the License Agreement as deemed in the best interest of the City.").

are objectionable as well.[19] It is not enough to argue, as the Counterclaim Cities do, that the ordinances regulate *aspects* of telecommunications companies that are *related to their fitness to provide services*, and therefore use the rights-of-way. For example, they say stock ownership is linked to a company's financial well-being, which may affect its continued existence, or its ability to pay fees or other necessary costs, which may ultimately affect its use of the right-of-way. This argument has the flavor of the old children's ditty, "Oh, your ankle bone connected to your leg bone, your leg bone connected to your thigh bone, your thigh bone connected to your hip bone . . . ."[20] This is simply too tenuous a connection to the "manage[ment] of rights of way." Under this semantic two-step, § 253(c) would have no limiting principle. The safe harbor provisions would swallow whole the broad congressional preemption. Municipalities could regulate nearly any aspect of the telecommunications business. Indeed, these regulations come perilously close to this *reductio ad absurdum*.

[30] Under the Supremacy Clause, a local law "is nullified to the extent that it actually conflicts with federal law" by "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillborough*, 471 U.S. at 713 (citation omitted).

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[19] For example, two cities' requirement for a public hearing before granting a franchise, see AUBURN MUN. CODE § 20.06.030, OLYMPIA MUN. CODE § 11.10.320; three cities' requirements for negotiations of the terms and discretionary acceptance of a franchise, see AUBURN MUN. CODE § 20.06.050, DES MOINES MUN. CODE § 20.02.19; OLYMPIA MUN. CODE § 11.04.050; and non-cost-based fees, see AUBURN MUN. CODE § 20.04.020, DES MOINES MUN. CODE § 20.09.112; OLYMPIA MUN. CODE § 11.04.020 (K) (authorizing council to set fee); TACOMA MUN. CODE § 16.01.5.3.1.

[20] DRY BONES (American spiritual derived from *Ezekiel* 37:1-14), *available at* http://www.hope.edu/bandstra/RTOT/CH12/BONES.HTM.

Because these elements of the ordinances are contrary to § 253 of the Telecom Act, they are preempted.

D. SEVERABILITY

To determine whether invalid portions of the ordinances are severable, we look to state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) ("Severability is of course a mater of state law."). Under Washington law, the test for severability is whether

> the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other . . . or, alternatively, whether the elimination of the unconstitutional portion so destroys the act as to render it incapable of accomplishing the legislative purposes.

State v. Anderson, 501 P.2d 184, 186 (Wash. 1972) (citation omitted). As the Counterclaim Cities note, a severability clause "offers to the courts the necessary assurance that the remaining provisions would have been enacted without the portions which are contrary to the constitution." *Id.* However, the existence of such a clause is not dispositive. Even with a severability clause, an ordinance must fall in its entirety when "the elimination of the [invalid] portion so destroys the act as to render it incapable of accomplishing the legislative purpose." *Guimont v. Clarke*, 854 P.2d 1, 16 (Wash. 1993) (quoting *Anderson*, 501 P.2d at 186).

[31] The Counterclaim Cities' ordinances contain a complex mix of application procedures, approval requirements, required franchise terms, financial and operations disclosure, and discretionary "catchall" clauses whose preempted provisions are so pervasive that it is not

practicable to conduct a line-by-line severability analysis of each city's municipal code. Were we to do so, the elimination of preempted sections of the codes would result in regulation requiring a disjointed franchise application, a lack of standards for approval, disapproval, or revocation by the cities, and cross-references leading the reader to non-existent provisions. As the district court held in *Bell Atlantic*, "given the number and variety of provisions of the [cities'] telecommunications franchise law[s] that are preempted by the [Act], . . . attempting to sever the invalid from the valid provisions would [not] be appropriate." *Bell Atl.*, 49 F. Supp. 2d. at 820-21 (applying Maryland Law).

This is not to say that the Counterclaim Cities cannot enact ordinances to manage the rights-of-way under § 253(c). But we cannot say that the objectionable portions of the present ordinances may be excised without rendering the end product a Swiss cheese regulation that would not be capable of "accomplishing the ordinances' legislative purposes." *Anderson*, 501 P.2d at 186.

CONCLUSION

We affirm the district court's order granting summary judgment for the Cities on their claim regarding relocation costs. We reverse the district court's order dismissing Qwest's counterclaim for lack of ripeness; we remand Qwest's counter-claim with regard to wireline facilities as preempted with instructions to grant judgment to Qwest because state law preempts the municipalities' ordinances with regard to wireline facilities. We remand Qwest's counterclaim with regard to wireless facilities with instructions to grant judgment to Qwest consistent with this opinion.

Affirmed in part and reversed in part and remanded with instructions. The parties shall each bear their own costs on appeal.

APPENDIX B

APPENDIX B

[Filed November 16, 1999]

UNITED STATES DISTRICT COURT,
W.D. WASHINGTON,
AT TACOMA

CITY OF AUBURN, et al., Plaintiffs,
v.
U S WEST COMMUNICATIONS, INC., Defendant.

Case No. C98-5595FDB

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND DENYING MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND MOTION ON THE PLEADINGS ON DEFENDANT'S COUNTERCLAIMS

Traditionally, whenever city improvements required the displacement of telecommunications equipment sited on the city's right of way, telecommunications companies bore the expense of relocating the equipment. However, on February 21, 1996, U S West notified cities and counties in the State of Washington that it would no longer bear these relocation costs, and announced that cities and counties would have to pay such costs in the future. This dispute is ongoing:

> For example, when the City of Vancouver directed U S West to move an aerial line to accommodate a City street project, U S West responded by demanding that the City agree to payment of $10,272.00 for the cost of relocating U S West facilities *before* work could be started. The letter accompanying the "Billing Proposal"

to the City of Vancouver stated:

> Attached are two copies of our Billing Proposal. We must receive both copies, signed at the acceptance paragraph, *before the work described on the USWC proposal can be started.*
>
> Declaration of William Whitcomb .... On May 19, the Senior Civil Engineer for the City directed U S West to proceed with the relocation of the facilities, noting that construction on the street project would begin within a few weeks and that it was "imperative that your facilities be relocated in advance of our construction." .
>
> U S West's conduct threatened to delay the street improvement project, and on June 2, the Senior Civil Engineer wrote again to U S West requesting confirmation of U S West's schedule.... Finally, after attorneys intervened, U S West agreed to proceed with the relocation, but continued to insist on charging the City.

Plaintiffs' Memo in Support of SJ at 3-4.

The plaintiffs, various cities in Western Washington, seek[1] a declaratory judgment that the defendant is still obliged to pay such relocation costs. U S West filed counterclaims as to a handful of the plaintiff cities,[2] which cities have recently passed ordinances seeking to regulate the telecommunications industry. The counterclaims would invalidate these ordinances.

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[1] While originally filed in state court, the defendant removed this action to the federal court on the basis of diversity jurisdiction.

[2] Auburn, Olympia, Tacoma, Des Moines and University Place.

There are a number of motions pending in this matter. The defendant, U S West, has moved for summary judgment of dismissal. The plaintiffs, various cities of Western Washington, likewise move for summary judgment. Further, U S West has moved for Judgment on the Pleadings on its counterclaims; the cities which are subject to the counterclaims have moved for partial summary judgment on the counter claims.

I. CROSS-MOTIONS FOR SUMMARY JUDGMENT

Summary Judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[3] *Retail Clerks Union Local 648, AFL-CIO v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1033 (9th Cir.1983). The opposing party "may not rest on conclusory allegations, but must set forth specific facts showing that there is a genuine issue for trial." *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir.1986); *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 876 (9th Cir.1987). "One of the primary purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses ...." *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

The plaintiffs point out that

> [t]he general rule is hornbook law: "A telegraph or telephone company is bound to make such changes as public convenience and necessity require *at its*

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[3] "The moving party is 'entitled to judgment as a matter of law' [when] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53 (1986).

own expense." 86 C.J.S. Telecommunications § 49 (emphasis added).

Plaintiffs' Opposition to U S West's Motion for Summary J. at 7.

> [I]t is of the highest importance that the public health shall be safeguarded by all proper means. It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when that state might require for a necessary public use that changes in location be made.

New Orleans Gaslight Co. v. Drainage Com. of New Orleans, 197 U.S. 453, 25 S.Ct. 471, 473, 49 L.Ed. 831 (1905) (holding that requiring the utility to relocate its pipes at its own expense did not constitute a legal injury).

Washington law is consistent:

> The company's other contention is that it is entitled to 'damages' from the city to the extent of the expense incurred in re-laying its pipes when necessitated by changes in street grades made upon the authority of the city.
>
> The principle of *damnum absque injuria* is an ancient one. It is applicable here. The city is not guilty of any tort; no wrongful act is being done. The necessity and convenience of the public is being served. No property

> is taken; no title is disturbed. The authorities are well-nigh unanimous that in such a case the city has a paramount right to serve the public necessity and convenience without payment for individual losses therefrom. Many roadside businesses have been destroyed by the rerouting of traffic or changes in the location of streets and highways.
>
> The paramount right of the city, in such case as this, precludes the availability of any remedy to the company. *Damnum absque injuria.*

Western Gas Co. v. Bremerton, 21 Wash.2d 907, 909, 153 P.2d 846 (1944).

A. Pre-Statehood Grant

U S West contends first that it is subject to a historical grant, characterized as a "constitutional contract" (Defendant's Memo in Support of SJ to Dismiss at 4), stemming from its providing telecommunication services prior to statehood. The drafters of the Washington Constitution recognized the important role of telecommunications: the Washington Constitution, Article XII, § 19, provides that

> Any association or corporation ... shall have the right to construct and maintain lines of telegraph and telephone within this state .... The legislature shall, by general law of uniform operation provide reasonable regulations to give effect to this section.

Pursuant to this provision, the Washington legislature, in its first session, passed an act pertaining to telephone and telegraph companies, now codified as RCW 80.36.040:

> Any telecommunications company ... doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street or highway, ... and may erect poles, posts, piers or abutments for supporting the insulators, wires and any other necessary fixture of the lines, in such manner and at such points as not to incommode the public use of the ... highway.

However, I cannot agree that this recognition of a right to erect and maintain telecommunications equipment along the public right of way cedes any unstated rights or creates an exception to the general rule; I do not see that there is a "constitutional contract" which overcomes the general rule that utilities should bear the expense of relocation of their equipment when required for the convenience of the public. The plaintiffs correctly note that even prior to statehood, the federal Post Roads Act required telegraph companies to maintain their lines so as "not to obstruct ... or interfere with the ordinary travel on such military or post roads." U.S.Rev.Stats. § 5263 (14 Stat. 221). The territorial legislature similarly provided that the right to construct telegraph lines was subject to the requirement that such lines "not unnecessarily obstruct[ ]" roads, streets, highways, etc. Territory of Washington, Private and Local Laws, Thirteenth Session 1866. The Washington Constitution, Article XII, § 19, itself provided for "reasonable regulations", and the first legislature recognized the right to erect telecommunications equipment only "in such manner and at such points as not to incommode the public use of the ... highway." Session Laws, 1889-90, Rem.Rev.Stat. § 11352.

B. TARIFF

As a public utility, U S West is extensively regulated by the state. U S West's rates, services, facilities and practices are under the regulation of the Washington Utilities and Transportation Commission ("WUTC"). RCW 80.01.040(3). U S West is required to file with the WUTC a tariff, a schedule of rates and services. RCW 80.36.100. The WUTC may order changes. A tariff which is not changed by the WUTC becomes effective thirty days after filing, RCW 80.36.110, and has "the force and effect of law." *General Telephone Co. v. Bothell,* 105 Wash.2d 579, 585, 716 P.2d 879 (1986).

Since 1968, U S West (or its direct predecessor) has filed tariffs with the WUTC which apportioned relocation expenses. The current tariff (WN U-31) states:

> When relocation or aerial to underground conversion of existing facilities is requested or required by law, the cost of constructing the new or removing the old facilities will be borne by the customer or others requesting the relocation or conversion.

Defendant's Memo in Support of SJ at 4. U S West argues that this provision shifting the expense of relocation to "others requesting the relocation" applies to cities, and that the tariff, having the "force and effect of law", trumps the general rule requiring utilities to bear expenses for relocation.

There is some degree of merit to the plaintiffs' argument that "[c]ities--not the WUTC--regulate U S West's use of City streets and rights-of- way." Plaintiffs' Opposition to Motion for SJ at 10. To say that a well-recognized

legal principle, like the allocation of expenses to utilities for the cost of equipment relocation in public right of way, may be abrogated by the general tariff enunciation that relocation expenses would be borne "by others" requesting relocation, would be to render state law unduly precarious.[4] The reasoning of the Colorado Supreme Court in *U S West v. City of Longmont*, 948 P.2d 509 (Colo.1997)(*en banc*) (holding that a pre-existing tariff did not preempt municipal ordinance requiring "undergrounding" of utility lines) is persuasive.

U S West relies heavily upon *General Telephone v. Bothell*, 105 Wash.2d 579, 716 P.2d 879 (1986). *Bothell* may be distinguished; I agree with the plaintiffs that the issue of tariff preemption of the state common law was not squarely before the Washington Supreme Court in *Bothell*. In light of the larger body of state law pertaining to the "paramount right" of cities to act to protect public necessity and convenience (*Western Gas Co. v. Bremerton, supra; State v. Public Utility Dist. No. 1*, 55 Wash.2d 645, 349 P.2d 426 (1960)), I must agree that Tariff WN U-31 does not preempt the cities' right to require the defendant to pay for relocation of equipment on the public right of way.

II. COUNTERCLAIMS

Following the passage of the Federal Telecommunications Act of 1996 ("FTA"), the Cities of Auburn, Olympia, Tacoma, Des Moines and University Place passed various ordinances governing the telecommunications companies.

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[4] I might further note that the recent decision in *Pierce County v. U S West Communications*, Pierce County Superior Court Cause No. 97-2-08395-3, clearly concluded that a WUTC tariff did not overcome preexisting state statute regarding the right of counties to shift the cost of equipment relocation to telecommunications companies.

The defendant filed counterclaims against these cities, contending that these ordinances violated the FTA, and were preempted. These "Counterclaim Cities" filed two motions for partial summary judgment on the counterclaims; the "Motion for Partial Summary Judgment on Counterclaim Re: Municipal Regulation of Rights of Way", and the "Motion for Partial Summary Judgment on Counterclaim Re: Undergrounding Ordinances". At around the same time, the defendant moved for judgment on the pleadings as to its counterclaims.

I have been unable to detect a ripe dispute as to the counterclaims. The defendant has not demonstrated that any of the Counterclaim Cities have attempted to enforce their ordinances against it. I am unaware, for example, that any city has instructed the defendant that it must remove its equipment for failure to file a franchise application. Regardless of the persuasiveness of the defendant's argument, *see Bell Atlantic-Maryland v. Prince George's County*, 49 F.Supp.2d 805 (D.Md.1999), I decline to broadly review these ordinances for the purpose of determining (a) which particular provision of which ordinance offends the FTA, and (b) whether the entire ordinance needs to be invalidated despite the ordinances' severability clauses. That analysis would be better conducted following specific attempts by the Counterclaim Cities to enforce their telecommunications ordinances.

I should note that the City of University Place amended its telecommunications ordinance, and has moved to have the counterclaims against it dismissed on the basis of mootness. The defendant agreed at oral argument that it did not oppose this request.

It is hereby

ORDERED:

(1) That the plaintiffs' Motion for Summary Judgment is GRANTED;

(2) That the defendant's Cross-Motion for Summary Judgment of Dismissal is DENIED;

(3) That the plaintiffs' Motions for Partial Summary Judgment to Undergrounding and Municipal Regulation of Rights of Way are DENIED as unripe;

(4) That the defendant's Motion for Judgment on the Pleadings on the Counterclaims is DENIED as unripe; and

(5) That the request of the City of University Place for dismissal of the defendant's counterclaims against it on the basis of mootness is GRANTED.

Dated this 15 day of November, 1999

/s/ Franklin D. Burgess
FRANKLIN D. BURGESS
United States District Court Judge